82-1436

No. A-559
IN THE

Supreme Court of the United States

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE COMPENSATION INSURANCE FUND,

Appellees.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Whether, after the City of Torrance had paid for insurance covering all injuries suffered by its employees, a statute which makes such insurance agreements unenforceable constitutes an unconstitutional impairment of contract in violation of the contract clause of the United States Constitution. U.S. Const. Art. I, § 10.
2. Whether a court, in assessing the constitutionality of legislation impairing contracts to which the State is a party, should apply a stricter standard of review than where the impaired contract is between private parties.

Parties to the Proceeding.

Appellant is the City of Torrance, California. Appellees are two state agencies, Workers' Compensation Appeals Board of the State of California and State Compensation Insurance Fund.

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JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

In the Appendix filed concurrently with this Jurisdictional Statement[1] appear the opinions of the California Supreme Court reported at 32 Cal. 3d 371, 185 Cal. Rptr. 645 (App. 4 *et seq.*), the California Court of Appeal (App. 26 *et seq.*) and the Workers' Compensation Appeals Board. (App. 38 *et seq.*).

GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. *Nature of the Proceeding.* California has established a state monopoly for selling insurance to public entities. Public agencies may purchase insurance only from State Compensation Insurance Fund (State Fund). The only alternative for the public agency is to be self-insured. State

[1]Citations herein to material printed in the Appendix appear as "App."

Fund, under its agreements with the City of Torrance (City), specifically agreed to pay ". . . any sums due for compensation for injuries . . . for which the Insured is liable." (App. 33).

In the case at bar, after State Fund received premiums from numerous public entities such as City, the Legislature abrogated State Fund's obligation to pay insurance benefits for victims of cumulative trauma. That obligation was shifted to self-insured employers previously insured by State Fund. City, however, had paid more than $1.5 million in premiums for State Fund's promise of such insurance coverage.

In 1978, the heirs of a City employee, Kenneth Atkinson, whose death was caused by a work-related injury sued it and State Fund. The employee had worked for City for a 21-year period (from 1956 to 1977) and sustained a cumulative trauma while in its employ. For 15 of those 21 years, State Fund had insured City against such claims. Thereafter, the City was permissibly self-insured.

In early 1978, City settled the claim with the employee's heir and sought a proportionate contribution of 72 percent (15/21) from State Fund pursuant to its insurance contracts. State Fund refused to pay. Instead, it moved to dismiss the City's claim before the Workers' Compensation Judge based upon recent legislation which abrogated State Fund's contractual duty to pay.

State Fund conceded that but for the legislation, it had an unqualified duty under its insurance contracts to contribute to the settlement. *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 376, 185 Cal. Rptr. 645, 647 (1982). (App. 8-9). City opposed State Fund's motion on the basis the statute unconstitutionally impaired its insurance contracts.

The Workers' Compensation Judge held the statute unconstitutional as applied to City's insurance policies. Upon review, the Workers' Compensation Appeals Board re-

versed. Over dissent, a majority of the California Supreme Court (and earlier, the California Court of Appeal) affirmed the WCAB decision. The majority found that despite City's payment of premiums for insurance coverage, its contracts were not impaired by the legislation. City appeals from that decision of the California Supreme Court.

2. *The judgment sought to be reviewed* is dated September 13, 1982, and is embodied in the published opinion of the California Supreme Court reported at 32 Cal. 3d 371, 185 Cal. Rptr. 645 (App. 4 *et seq.*). The California Supreme Court denied City's petition for rehearing on October 13, 1982. (App. 2). The notice of appeal to this Court was filed on December 20, 1982. (App. 2). Appellant was granted an extension of time by this Court until February 26, 1983 to file its jurisdictional statement. (App. 1).

3. *The statutory provision believed to confer jurisdiction of the appeal to this Court is* 28 United States Code Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Article I, Section 10: "No State shall . . . pass any . . . Law impairing the obligation of Contracts."

California Labor Code Section 5500.5(a) (Deering 1982) (effective January 1, 1978):

> "[L]iability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury . . . or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next

two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year"

* * *

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

That amendment repealed Labor Code Section 5500.5(d) which had provided that:

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workers' compensation liability of such employer during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during

their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured."

STATEMENT OF THE CASE.

Appellant City of Torrance (City) is a California city with a population of 138,000. It employs approximately 1,200 people. Like numerous other public entities, City purchased insurance coverage from the State Compensation Insurance Fund (State Fund) for many years.[2] Only State Fund may sell insurance to public entities in California.[3]

State Fund agreed to pay for all injuries, including cumulative trauma, sustained by City's employees:

> "State . . . Fund . . . does hereby agree . . . (1) to pay promptly and directly to any person entitled thereto . . . *any sums due for compensation for injuries* . . . [and] *to pay the compensation*, if any, *for which the Insured is liable*." (App. 33) [emphasis added].

In return for State Fund's promise to provide coverage for which the City "is liable", City paid State Fund more than $1.5 million in premiums during the period of Atkinson's employment. Other public entities paid for identical insurance coverage.

City had employed Atkinson as a fireman from 1956 to 1977. After his death from cancer in 1978, his daughter sued City and its insurer, State Fund, for compensation

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[2]On July 1, 1971, City became legally self-insured pursuant to Labor Code Section 3900.

[3]The State Fund was established by California Constitutional mandate. State Fund's Board of Directors is composed of the State Director of Industrial Relations and four others appointed by the Governor of California. Cal. Ins. Co. § 11770. Employees of State Fund are civil servants. State Fund is authorized to receive specific appropriations from the legislature. Cal. Ins. C. § 11773. The State Treasurer serves as custodian for all monies and securities belonging to State Fund (Cal. Ins. C. § 11788) and the Board of Directors is required to invest all surplus monies. Cal. Ins. C. § 11797.

benefits. Atkinson's death was alleged to have resulted from a cumulative trauma developed during 1956 to 1977, the 21 year period Atkinson worked for City.

A. Cumulative Trauma.

Cumulative injury was recognized as compensable in California long before any of the insurance contracts between City and State Fund were written. A cumulative trauma or injury is statutorily defined as an injury "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Cal. Labor Code § 3208.1. Typical claims involve repeated exposure to such external agents as chemicals or cumulative internal effects such as tension or stress-related illness.

As recognized by the California Legislature when considering passage of the legislation at issue, the concept of cumulative trauma is well known to employers and insurance carriers, including State Fund. Benefits have been awarded to employees for cumulative trauma since 1918. Cal. Assem. Com. on Finance, Insurance, and Commerce, Interim Hgs. (January 12 and 19, 1977), p. 45. For three decades, California appellate decisions have similarly held that cumulative trauma is compensable. *See, e.g., Lumbermen's Mutual Casualty Co. v. Industrial Accident Comm'n*, 29 Cal. 2d 492, 175 P.2d 823 (1945); *Fireman's Fund Indem. Co. v. Industrial Accident Comm'n*, 39 Cal. 2d 831, 250 P.2d 148 (1952).

To cover cumulative trauma claims, State Fund was required to establish reserves out of premiums paid by City and its other insureds. Such reserves recognize the lengthy period of time associated with the filing of cumulative trauma claims. Until the daily micro-trauma results in a compensable injury, the premiums are placed into reserves for "incurred but not reported injuries." Until the claim is paid from the reserve, State Fund is permitted to earn income

on these reserves. Cal. Ins. Code § 11797. State Fund presently holds $70 million in a contingency reserve (awaiting upon the outcome of this and another lawsuit). State Fund Annual Report, 1981, p. 15 n. 4.

B. The History of Labor Code Section 5500.5.

City entered into its insurance contracts with and paid its premiums to State Fund against a background of a quarter century of legislative recognition of the insurability of cumulative trauma.

In 1951, the California Legislature enacted Labor Code Section 5500.5 providing that an employee suffering a cumulative injury could recover against any employer whose employment contributed to the disease or injury. The employer (or its insurer) could then seek contribution from other employers (and their insurers) for the portions for which they were responsible. Section 5500.5 was determined to cover cumulative injury by case law. *See e.g., Fireman's Fund Indem. Co. v. Ind. Acc. Com.*, (1952) 39 Cal. 2d 831, 835, 250 P.2d 148.

In 1973, the Legislature amended Section 5500.5 to expressly cover cumulative injury claims. Although the statute was amended in several respects not pertinent here, subdivision (d) of Section 5500.5 provided that if an employee was employed by the same employer for more than five years during which he was exposed to the hazard which caused his injury, all insurers of the employer during his employment would be liable. Subdivision (d) was popularly known as the "single employer exception." (Quoted at p. 4, *supra*).

In 1977, the Legislature amended Labor Code Section 5500.5 to repeal the "single employer exception" effective January 1, 1978. The constitutionality of this latest amendment is the subject of this appeal.[4] (Quoted at 3-4, *supra*).

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[4]The 1977 amendment is made applicable to all claims filed on or after January 1, 1978. Atkinson's heir's claim for death benefits was filed April 10, 1978.

State Fund conceded that but for the 1977 amendment, State Fund would have been required under its insurance contracts to pay 72 percent (15/21) of the settlement amount. (App. 8-9). This amount is based upon the number of years Atkinson worked for City during which State Fund was City's insurer. Relying upon the 1977 amendment, however, State Fund refused to pay any part of the settlement despite its unqualified contractual obligation to do so. It, furthermore, kept all the premiums and the cash reserves set aside for such claims.

C. Proceedings Below.

After settling the claim, City sought contribution under its insurance agreement from State Fund before the California Workers' Compensation Appeals Board. State Fund moved to dismiss on the sole basis that it was not obliged to honor its contractual commitments after passage of the 1977 amendment to Labor Code Section 5500.5.

City opposed the request for dismissal on grounds that the 1977 amendment unconstitutionally impairs the insurance contracts at issue. The Workers' Compensation Judge determined the statute to be unconstitutional. (App. 56-57). Moreover, the judge found untenable the justification advanced for the statute — that it eliminated administrative confusion as to the number of parties joined in a compensation proceeding. Since the State law precludes public agencies from obtaining insurance from sources other than State Fund, the maximum number of defendants involved would be only two, an insignificant basis for eliminating City's expectation of insurance coverage. (App. 57).

On appeal, the Workers Compensation Appeals Board reversed. In doing so, the Board did not discuss a single constitutional issue presented. (App. 38 *et seq.*). City sought review before the Court of Appeal which ruled in favor of State Fund on October 27, 1981. Similar to the Board, the court, in upholding the legislation, did not discuss a single

case regarding the contract clause of the United States Constitution. (App. 26 *et seq.*).

On petition for hearing before the California Supreme Court, City again urged that the 1977 amendment to Labor Code Section 5500.5 unconstitutionally impaired City's contracts of insurance with State Fund. That impairment, it contended, violated the contract clauses of the United States and California Constitutions.

In upholding the legislation, the Supreme Court did not explain how avoidance of responsibilities by State Fund was consistant with City's reasonable expectations that State Fund would honor its express obligation to pay "any sums . . . for which the Insured is liable." (App. 33). Despite City's payment of insurance premiums to State Fund, City will still be liable to pay its employees injured by cumulative trauma. The California Supreme Court concluded that "the *only* obligation State Fund assumed [under the contracts] was the obligation to pay what the Workers' Compensation law required." 32 Cal. 3d at 378, 185 Cal. Rptr. at 649. (App. 11-12). In so stating, the court confused the issues. The employer-employee relationship, the City agreed, might be affected as to the scale of benefits provided to injured workers. The City, however, had not agreed to accept changes in State Fund-City relationship. Based upon the limited incorporation of the scale of employee benefits which could be modified, the court erroneously reasoned that City agreed to be bound by *all* changes in the law which might affect the insurance agreement, including total ab-

rogation of State Fund's responsibilities.[5] Therefore, the court determined City had no legitimate contractual expectation that it would continue to be covered by State Fund for those years for which City had paid premiums. 32 Cal. 3d at 379-380. (App. 13-14).

In approving the legislative abrogation of the contractual rights of City and all other public entities, the majority of the California Supreme Court ignored the controlling authority of *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, *reh'g denied*, 431 U.S. 975, 97 S.Ct. 2942 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, *reh'g denied*, 439 U.S. 886, 99 S.Ct. 233 (1978). Those decisions indicate that no deference should be given a state legislative determination that a statute is reasonable and necessary to achieve a legitimate state goal if the State is a party to the impaired contract. Instead, the majority relied upon inapposite California cases. 32 Cal. 3d at 383-384, 185 Cal. Rptr. at 651-52. (Mosk, J. dissenting). (App. 19). Contrary to constitutional mandates, the majority gave total deference to the California Legislature's determination that the statute was reasonable and necessary to achieve a legitimate goal.

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[5]The California Supreme Court focused upon the undoubted fact that the City and State Fund agreed to be bound by changes in compensation benefits. For example, weekly maximum temporary disability rates were changed from $154 per week to $175 in 1981. That such a modification was contemplated by the parties was also conceded at oral argument. (App. 51). Unfortunately, the California Supreme Court used this limited amount of permissible change as the predicate for the conclusion that the parties agreed to accept *all* changes in the law (32 Cal. 3d at 378, 185 Cal. Rptr. at 649). In reaching that conclusion the court ignored the principle that "a promise to pay, with a reserved right to deny or change the effect of the promise is an absurdity." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 1519 n. 23 (1977).

The state court has also rejected City's efforts to clarify the issue as to what it had conceded as to the nature of the contract. It has not permitted a certified short hand reporter access to the tape recording of the oral argument. (App. 50). Moreover, it has rejected City's attempts to obtain reconsideration and rehearing. (App. 51).

SUBSTANTIALITY OF FEDERAL QUESTIONS.

The issues presented here are critically important to every city, county, school district and other political subdivision of California.[6] State law requires every political subdivision to contract with State Fund — an arm of the State — for insurance against liability arising from work-related injuries or be self-insured. Cal. Labor Code § 3900. No political subdivision may obtain insurance from a privately owned insurer. *Id.* Consequently, numerous political subdivisions of the State — like City — entered into bargained-for contracts with State Fund and paid premiums to State Fund in reliance upon its promise to pay benefits under contracts of insurance.

Both the money paid in premiums and shifts in liability made by the statute are substantial. City alone paid $1.5 million in premiums for such insurance. The Legislature initially predicted that the legislation would shift $52.7 million in liability from State Fund to employers of injured workmen. Assem. Comm. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (April 27, 1977). State Fund now admits that it will retain approximately $70 million if permitted to avoid honoring its contractual obligations in this and another pending action. Annual Report, 1981, p. 14, n. 4.

This legislation is particularly pernicious since it permits State Fund to retain the premiums as well as monies earned through investment of those premiums. Moreover, although State Fund has set aside many millions of dollars in reserves to cover projected liability for these claims, the abrogation

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[6]One test for measuring concern about the enforceability of the State Fund's unqualified obligation to pay, as stated in the insuring agreements, "compensation, if any, for which the Insured is liable" is the number of amicus curiae briefs filed in the state courts. Separate briefs were filed by County of Los Angeles, California Workers' Compensation Institute, California Self-Insurers Association, Council of Self-Insured Public Agencies, City of Sacramento, and Industrial Indemnity Co.

of its contractual obligation does not provide the insureds any recoupment of those reserves.

The legislation is contrary to the expectations of California public agencies as to State's Fund's obligation to pay for workers' injuries. The 1977 amendment to Section 5500.5 has resulted in a sudden, unanticipated, permanent and substantial shift in liability to City and similar entities. Simultaneously, it provides an unjustified windfall gain to State Fund.

The impact of this amendment is not limited to financial difficulties for public entities. All injured public employees must rely solely upon their employer for payment of insurance benefits. Necessarily, if a public entity paid premiums to State Fund for insurance, it did not set aside reserves (as State Fund did) to cover cumulative injuries. As a result, the required funds are simply not available to cover this unexpected liability.[7]

These issues of contractual obligation are of particular significance because the State is a party to the contracts at issue. If the State is permitted to unilaterally repudiate its obligations, the public's confidence in the State's good faith compliance with its agreements will be irreparably undermined. Such a precedent would have the far-reaching effect of placing every person on notice that all agreements with the State of California may be repudiated. As demonstrated by the instant case, not even the public (through such entities

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[7]For example, during the January 12 and 19, 1977 Interim Hearings of the Assembly Committee on Finance, Insurance, and Commerce, a representative of the Los Angeles Unified School District, an organization of 76,000 employees, explained to the legislative committee that because of taxing limitations that apply to the districts, the school districts will be unable to pass this sudden increase in liability on the taxpayers. Therefore, "less funds will be available [to the school districts] to maintain even the present level of education." Assem. Com. on Finance, Insurance, and Commerce, Interim. Hgs. on Assem. Bill No. 155 (Jan. 12 and 19, 1977) p. 328.

as the City of Torrance) can rely upon the State to honor its obligations.

Finally, the necessity for this Court's intervention is highlighted by the difference between the California Supreme Court and the Ninth Circuit Court of Appeals in determining the proper standard for review of legislation impairing a contract to which the State is a party. On the one hand, the Ninth Circuit in *Continental Illinois National Bank v. Washington*, No. CA. 82-3404 (9th Cir. Jan. 11, 1983) considered the constitutionality of legislation placing new restraints on the sale of municipal bonds. Because the State was a party to the contracts which were impaired, the Ninth Circuit held that the Constitution required a stricter scrutiny to determine whether the legislation was constitutional than if the contracts had been solely between private parties *Id.* at 17. In contrast, in the case here on appeal, although the State of California is a party to the contracts at issue, the majority of the California Supreme Court ignored the State's role as a contracting party. Accordingly, the present conflict poses grave uncertainty as to the proper degree of deference to be afforded legislative determinations which result in impairment of State's contracts.

POINT 1.

CALIFORNIA LABOR CODE SECTION 5500.5 UNCONSTITUTIONALLY IMPAIRS THE CITY'S INSURANCE CONTRACTS IN VIOLATION OF THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.

1. The Impairment.

The direct purpose and intended effect of the legislation at issue is the total abrogation of vested contract rights.[8] There is no dispute that but for the 1977 amendment, State Fund was contractually obligated to pay 72 percent of the settlement amount to Atkinson's heir under the contracts with City. State Fund has so conceded. *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 376, 185 Cal. Rptr. 645, 647 (1982). (App. 8-9). The legislation did not impair duties incidental to the contracts. Rather, State Fund's promise to pay all claims was the primary consideration for City entering into the contracts.[9] In return for $1.5 million paid by City in premiums, State Fund agreed: "to pay promptly and directly to any person entitled thereto under the Work[ers'] Compensation Laws . . ., any sums due for compensation . . . for which the [City] is liable. . . ." City's contractual right to benefit from State Fund's

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[8]"A legislative committee report on the effect of the 1977 amendment notes that if an employer [like City] has recently become self-insured, he may be fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. . . . The exact amount [of the financial amount involved in this shift] . . . is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period 1978 through 1981 . . . The greatest fiscal impact appears to be on those public agencies who were formerly covered by the State [Fund]." *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 37 at 381-82, 185 Cal. Rptr. 645 at 650 (quoting Assem. Com. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (April 27, 1977) p. 4).

[9]Compare *El Paso v. Simmons*, 379 U.S. 497, 514, 85 S.Ct. 577, *reh'g denied*, 380 U.S. 926, 85 S.Ct. 879 (1965) (reinstatement provision was a peripheral element of the contract at the time the buyers first acquired the land and had not substantially induced the original buyers to acquire the land).

undertaking was fully vested when the statute was passed. City's *sole* benefit under the contracts — State Fund's duty to pay — is rendered valueless as a result of the legislation.

Despite the severe, permanent effect of the amendment's impact upon State Fund's obligation to pay claims, the California Supreme Court erroneously concluded that the legislation did not impair City's contractual rights. The court reasoned that because workers' compensation is subject to State regulation, the parties agreed to be bound by *all* subsequent changes in the workers' compensation laws, including those statutory provisions which were directed to insurance contracts between employers and their insurance carriers. 32 Cal. 3d at 379-80, 185 Cal. Rptr. at 648-49. This contention is unsupportable in fact or logic.

First, the contract language does not support the court's reasoning. State Fund agreed to "pay any sums due for compensation . . . for which the [City] is liable. . . ." In return for this unqualified promise to satisfy such claims, City paid substantial premiums. It is ludicrous to suggest that City or any other public entity, would enter into insurance contracts and pay $1.5 million in premiums to State Fund knowing that the State could unilaterally terminate its contractual duties. After the legislation, City remains liable for such claims. To suggest that a total abrogation of insurance benefits was within the parties' expectations is to deny that a legally binding contract ever existed. "A promise in a contract that gives one party the power 'to deny or change the effect of the promise, is an absurdity.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n. 23 (quoting *Murray v. Charleston*, 96 U.S. 432 at 445 (1978)).

Second, although state regulation may impact the level of compensation benefits granted to workers, such regulation does not grant authority to the State to abrogate the obligation of insurance carriers to their insureds. One of the primary purposes of the contract clause was to protect the vested, contractual rights of individuals from State inter-

ference. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427, 54 S.Ct. 231 (1934); *Id.* at 454-64 (dissent). Here, the City had a vested right to insurance coverage. The State's regulation of compensation benefits to employees does not justify the abrogation of State Fund's contractual duties to the employer. The limitations upon State action imposed by the contract clause cannot be voided merely because the contracts touch upon an area subject to regulation.

At best, State regulation of the subject matter of the contract is only one factor to be considered when determining whether an impairment exists. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4105, 4109 (1983). Moreover, prior regulation alone is insufficient to justify abrogation of contract rights. Instead, it is the *nature* or *type* of regulation that determines the foreseeability and, therefore, the reasonableness of the legislation. *Continental Illinois Nat'l Bank v. Washington*, No. CA 82-3404, slip op. at 20 (9th Cir. Jan. 11, 1983). For example, in *Energy Reserves Group, Inc. v. Kansas Power and Light Co., supra*, this Court recently upheld a Kansas statute imposing price controls on natural gas sold in the intrastate market. Since price regulation existed when the parties entered into the contract, this court held that the Kansas price controls were of the *type* of legislative change that was foreseeable to the parties. 51 U.S.L.W. at 4110. *See also Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792 (1940) (withdrawal rights of shareholders previously regulated by state; shareholder's rights may be further affected since "he purchased subject to further regulation on the same topic").

Simply put, unlike *Energy Reserves, supra*, and *Veix*, the State's total abrogation of City's vested right to indemnification under its contracts of insurance was not the *type* of legislation that was reasonably foreseeable to City when it entered into the contracts. Even if changes in levels of

benefits was foreseeable, the total abrogation of the State Fund's obligation to make payments (and the shifting of such costs to the City) was not. If the contract clause is to retain any meaning whatsoever, the power of the State "must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation. . . ." *Blaisdell*, 290 U.S. at 416. Based upon the foregoing, appellant submits that the California court erroneously determined that the legislation resulted in no contractual impairment.

2. Severity of the Impairment.

The severity of the contract impairment determines the level of scrutiny to which the legislation will be subjected under the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, 98 S.Ct. 2716, 2722-23 (1978); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4108-09 (1983). The heart of the insurance contracts at issue have been eviscerated by the 1977 amendment. This total abrogation of contractual obligations was both unexpected and unforeseeable. It is difficult to conceive of an impairment more severely affecting City's contracts with State Fund than failure to pay claims under an insurance policy. *Cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (modification of pension plan found to be substantial because of the added financial burden); *see United States Trust Co. v. New Jersey*, 432 U.S. 1, 26-27, 97 S.Ct. 1505 (total destruction of contractual expectations is not necessary for a finding of substantial impairment). Where, as here, the impairment is substantial, "[t]he presumption favoring 'legislative judgment as to the necessity and reasonableness of the particular measure,' [citation] simply cannot stand . . . ." *Allied Structural Steel*, 438 U.S. at 247 (quoting *United States Trust*, 431 U.S. 1, 23).

(a) Reasonableness and Necessity of Impairment.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978), this Court identified six factors to be assessed in determining whether legislation is justified:[10] (1) whether the law was enacted in response to an emergency; (2) whether the relief provided by the statute was properly tailored to the emergency; (3) whether the statute imposed reasonable conditions; (4) whether the legislation is limited to the duration of the emergency; (5) whether it is directed toward a basic societal interest as opposed to a narrow, particularized interest; and, (6) the degree to which the subject matter has previously been regulated. *Id.* at 242. Those criteria, however, have not been satisfied in the case of an appeal.

The facts in *Allied, supra*, illustrate the application of these factors. In 1974, Minnesota enacted the Private Pension Benefits Protection Act (the Act). All employers with over 100 employees and which provided a pension plan were subject to the Act. The Act provided any employer going out of business or closing its Minnesota office would be subject to a pension fund charge if the assets in the pension plan were not sufficient to provide full pension for all employees who had worked ten or more years. *Id.* at 238.

Allied Structural Steel Co. (the Employer) maintained an office in Minnesota. In 1963, the Employer voluntarily adopted a pension plan but retained the right to modify or terminate the plan. The unqualified right of the Employer to terminate the plan became the focal point of the litigation.

After the Act was passed, the Employer closed its Minnesota office. Based upon the Act, Minnesota imposed a

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[10]The first five of these factors were borrowed from this Court's earlier decision in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 298, 54 S.Ct. 231 (1934). The sixth appears to have originated in *Veix v. Sixth Ward Bldg. & Loan Ass'n.*, 310 U.S. 32, 60 S.Ct. 792 (1940) discussed at page 16 of this brief.

pension funding charge of $185,000 on the Employer, despite its right to modify or terminate the plan. The Employer challenged the statute as an unconstitutional violation of the contract clause. This Court found the statute unconstitutional; in doing so, it reversed the state court. This Court reasoned that the statute had not been enacted to deal with a broad, generalized economic or social problem. Furthermore, the statute did not "affect simply a temporary alteration of the contractual relationship of those within its coverage, but [instead] worked a severe, permanent and immediate change in those relationships — irrevocably and retroactively". The legislation, moreover, did not operate in an area already subject to state regulation. Finally, the Act was narrowly aimed at those who had voluntarily agreed to establish pension plans for their employees. *Id.* at 250.

The reasoning of this Court in *Allied* is applicable to this appeal. The legislation that is the subject of this appeal has as its direct aim the abrogation of State Fund's financial obligations to City and similar employers to pay cumulative trauma claims, particularly those who recently became self-insured.[11] As in *Allied*, there is no economic or social problem which justifies the abolition of contract rights. As in *Allied*, there is no emergency. As in *Allied*, the legislation "work[s] a severe, permanent and immediate change in [contractual] relationships." (*Id.*) Furthermore, more egregious than in *Allied*, the financial gain to State Fund (and loss to the City and other public agencies) is significant — over $50 million. Finally, the financial gain to State Fund is not an incidental effect of the statute; it is central.

It bears emphasis that although the loss to the insured public entities is substantial, the justification for placing the unexpected burden upon them is non-existent. The justification for this legislation is administrative convenience, *i.e.*, limiting the number of parties appearing at workers' com-

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[11]See note 9, *supra*.

pensation proceeding. That purported rationale was properly rejected by the Workers' Compensation Judge. She focused upon the fact that the State has created a monopoly for sales of insurance to public entities. Accordingly, there could never be more than two defendants. Such administrative convenience, if there were any, did not justify the outright abrogation of the City's contractual rights:

> ". . . [T]he search for insurance records of a single employer faced with a potential liability for cumulative trauma occurring during a period of fifteen or twenty years does not appear to threaten such a substantial and material harm to the people of the state as to warrant the outright destruction of rights under insurance contracts fully paid for and fully in force and effect but for such abrogation. It would appear that the legislature in providing for the single-employer exception in the earlier amendment, recognized this fact." (App. 57).

State Fund, moreover, has made no showing that there exists substantial harm to the State so as to warrant abrogation of City's insurance contracts. In fact, State Fund currently has $70 million in a contingency reserve awaiting the outcome of this and another lawsuit. (1981 Annual Report, p. 14 n. 4). In sum, there is no showing that the legislation is addressed to an emergency or that the relief provided by the statute — a windfall gain of many millions to State Fund — was required by a public emergency.

In addition, the statute is unreasonable. It does not require State Fund to return premiums paid to it for insurance by City or other insureds.[12] Furthermore, the statute does not require any return of the profit that State Fund made from investment of those premiums. To uphold legislation impairing contracts, this Court has required that the emergency be clear and the impairment limited to the nature of the

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[12]City alone paid more than 1.5 million in premiums during the period of Atkinson's employment.

emergency. For example, in *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. at 445-47, this Court recognized the conditions imposed by the legislation on enforcement of contracts, were reasonable because the contractual indebtedness continued to run and the mortgagee was still bound by the loan contract. In summary, in this case, the legislation *permanently* impaired the contracts of City and every other public entity in California without justification, emergency or otherwise.

POINT 2.

A STRICTER STANDARD OF REVIEW IS REQUIRED WHERE THE STATE IS A PARTY TO THE IMPAIRED CONTRACT THAN THAT UTILIZED BY THE CALIFORNIA SUPREME COURT.

If a State is a party to an impaired contract, the court must apply a stricter standard in reviewing legislation than if the contract is between private parties. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519 (1977). One reason for this stricter standard is that because the State's own interests are involved, it cannot be assumed the State acted as a disinterested party in determining the reasonableness and necessity of the legislation. *Id.* A second rationable for such scrutiny arises from the pervasive affirmative role government now has in our society; simply put, the government must be credible:

> "For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance that it could instead have spurned. When government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*"

L. Tribe, *American Constitutional Law* § 9-7 (1978) (footnote omitted) (emphasis in original).

Where, as here, the State's interest is purely financial, the likelihood of abuse is great. As this Court has recognized, "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S.Ct. 1505, 1519 (1977).

This Court has mandated different standards of review for courts to utilize in examining public and private contracts. In *United States Trust Co. v. New Jersey, supra*, this Court considered a bi-state compact between New York and New Jersey which created a Port Authority (Authority). The Authority issued bonds to private investors to finance its ventures which were paid through revenues derived from operation of toll bridges and tunnels. *Id.* at 4-5.

In 1962, the New Jersey and New York legislatures empowered the Authority to acquire and operate the financially troubled Hudson & Manhattan Railroad. *Id.* at 9-10. To relieve bondholder concern over this unprofitable acquisition, New York and New Jersey statutorily covenanted to limit the extent to which Authority revenues could be applied to deficits resulting from operation of the transit facilities. *Id.* at 9-10.

During the 1974 energy shortage, the legislatures of both states retroactively repealed the 1962 covenant, resulting in total abrogation of the security provision of the bonds. *Id.* at 14. United States Trust Co., a holder of and trustee for Port Authority bonds, brought suit against New Jersey alleging that the 1974 legislation repealing the covenant was an unconstitutional impairment of the obligation of contract. This Court agreed with the bondholders and found the statutory repeal violated the contract clause. *Id.* at 32.

This Court determined that the statutory repeal impaired the obligation of the states' contract since it eliminated an

important security provision of the bondholders. In determining the validity of the impairment, the Court focused upon the public nature of the contract. This Court held that if a State is a party to the impaired contract, deference to the legislative determination of reasonableness and necessity is inappropriate. *Id.* at 22-23.

In determining constitutionality of the repeal, this Court reviewed whether (1) the repeal was essential to achieve the legislative purpose and (2) less restrictive alternatives were available to the legislature. *Id.* at 29-30. The Court found that the legislature could have adopted other means to achieve its goal. In so holding, this Court rejected the State's argument that selection among alternatives is a matter solely for the State's legislative discretion: "[A] state is not completely free to consider impairing the obligations of its own contract on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment where an evident and more moderate course would serve its purposes equally well." The repeal could not be upheld as reasonable on the basis of the need for mass transit because the 1962 covenant was adopted with knowledge of those concerns. *Id.* at 31-32.

That principle has also found expression in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 244 n. 15. Similarly, most recently, this Court followed its decisions in *United States Trust Co.* and *Allied Structural Steel Co.* in its decision in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4109 n. 14 (1983) declaring:

> "When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. [citations] When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is

> not appropriate because the State's self-interest is at stake.' "

Unfortunately, that principle was ignored by the state court in the instant case.

The presumption against deferring to legislative judgments in cases involving the State as a contracting party can be overcome. Unlike the case at bar, a substantial justification must be demonstrated to permit a state to disavow its obligations. For example, in *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, *reh'g denied*, 380 U.S. 926, 85 S.Ct. 879 (1965), the state had sold public lands to finance public schools under land sale contracts. Many purchasers became delinquent on their contracts and the land was forfeited to the state and resold. Many parcels were later found to have oil and other valuable mineral rights. To stabilize the resulting land titles, Texas imposed a five year limitation for redemption of such property. Although the statute affected a purchaser's previously unlimited right to redeem, the statute was found to be constitutional because of three main factors: First, the statute eliminated disputes between private parties — successive delinquent purchasers of the same property. Second, the unlimited right to redeem was not a central part of the contract to purchase property; rather, it was peripheral. Third, the circumstances making the right to redeem of importance — a desire to speculate in mineral rights — was not foreseeable when the contracts were entered into. In contrast, in the case at bar, there is no such public interest in providing a multi-million dollar windfall to State Fund.

Similar justification for avoiding an obligation was presented in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 62 S.Ct. 1129 (1942). As a result of economic depression, the city was bankrupt. In accordance with a state statute, it sought to reorganize its economic affairs by obtaining the consent of 85 percent of its creditors to restructure its bond debt. Thereafter, it obtained court ap-

proval of the plan agreed upon by the creditors. This Court determined that the minority of the creditors could not upset the plan. It also indicated that the contract rights of the creditors were of nominal value because of the City's bankruptcy. Accordingly, it held that the reorganization plan would not be held unconstitutional. That plan had turned a "depreciated claim of little value . . . into substantial value" *Id.* at 516. In short, no substantial contract right of the City's bond holders had been impaired. In contrast, in the case at bar, the dollar value of the City's contract right is clearly substantial. It is the State, through this legislation alone, which has depreciated City's contract rights.

The consequences of the legislative abrogation of State Fund's duty to honor its insurance contracts to City are significant. Since the claims of injured workers must be paid, the City (and other public agencies) must resort to increases in taxation although they have already paid State Fund to assume that responsibility. As recognized by this Court, "[T]he notion that a city has unlimited taxing power is, of course, an illusion." *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. at 509. The impact upon public agencies like the City caused by this legislation is substantial and unjustified.

In summary, the California Supreme Court ignored the governing standard established by this Court for reviewing such legislation. That court improperly failed to consider that the State, as a party to the contracts, had improperly repudiated its financial obligations to City for no purpose other than to increase its own coffers. If permitted to stand, the decision of the California Supreme Court would stand the contract clause on its head. It would give the State unfettered authority to "refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private

welfare of its creditors." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977). That, however, is not a justification countenanced by the Constitution.

CONCLUSION.

The appeal should be heard and the decision of the California Supreme Court be reversed.

Respectfully submitted,

ROGERS & WELLS,
By ERWIN E. ADLER,
KEGEL, TOBIN & HAMRICK,
By DAVID E. LISTER,
Attorneys for Appellant,
City of Torrance.

APPENDIX.

Order.

Supreme Court of the United States.

City of Torrance, Appellant, v. Workers' Compensation Appeals Board, etc., et al. No. A-559.

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including February 26, 1983.

William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of December, 1982.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

City of Torrance, Appellant, v. Workers' Compensation Appeals Board of the State of California; State Compensation Insurance Fund, Appellees. No. LA 31517.

Filed: December 20, 1982.

Notice is hereby given that City of Torrance, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of California, affirming the judgment entered herein on October 13, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Kegel, Tobin & Hamrick
By /s/ David E. Lister, Esq.
David E. Lister, Esq.
Counsel for Appellant,
City of Torrance

Denial of Petition for Rehearing.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Oct. 13, 1982.

I have this day filed Order REHEARING DENIED.

In re: LA *No.* 31517, City of Torrance *vs.* W.C.A.B., State Compensation Insurance Fund.

Respectfully,

Clerk

Opinion of the California Supreme Court.

[L.A. No. 31517. Sept. 13, 1982.]

CITY OF TORRANCE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and STATE COMPENSATION INSURANCE FUND, Respondents.

SUMMARY

A city petitioned to the Supreme Court for a writ of review after the Workers' Compensation Appeals Board granted a motion for dismissal (and denied a subsequent petition for reconsideration) made by the State Compensation Insurance Fund (State Fund), in a workers' compensation proceeding in which the city sought contribution for its settlement of a claim by the heir of a city fireman which had been brought against the city and State Fund. It had been alleged that the fireman's death had been proximately caused by a cumulative injury which had developed during the course of his employment with the city. After settling the claim, the city, which was self-insured, sought contribution from State Fund, based upon the fireman's employment during the time State Fund had insured the city for workers' compensation liability. The city based its claim on Lab. Code § 5500.5 (providing for benefits from successive employers or insurance carriers for an employee disabled by cumulative injury or occupational disease, with liability apportioned among them). However, a 1977 amendment shortened the period of exposure previously created by the statute as to prior employers and insurers, such that State Fund was not liable for any part of the fireman's claim.

The Supreme Court affirmed the board's decision. The court held that the 1977 amendment did not violate the contract clause of U.S. Const., art. I, § 10, or Cal. Const., art. I, § 9 (prohibiting the enactment of laws impairing the

obligation of contracts), although prior to the amendment the city would have been entitled to contribution from State Fund, and although the city, before becoming self-insured, had paid premiums to State Fund in return for benefits for that portion of any cumulative injury attributable to the period during which coverage was provided. In so ruling, the court held that it was the intention of the parties to incorporate subsequent changes in the law into the compensation insurance agreements. (Opinion by Bird, C. J., with Richardson, Newman, Kaus, Broussard and Reynoso, JJ., concurring. Separate dissenting opinion by Mosk, J.)

COUNSEL

Kegel, Tobin & Hamrick, Kegel & Tobin and David E. Lister for Petitioner.

John H. Larson, County Counsel (Los Angeles), Milton J. Litvin, Daniel E. McCoy, Deputy County Counsel, Kendig, Stockwell & Gleason, Eugene L. Stockwell, Jr., Owens O'Keefe Miller, John C. Shaffer, Jr., Herrick, Lundgren, Hays, Shaffer & Lancefield, James P. Jackson, City Attorney (Sacramento), and William P. Carnazzo, Deputy City Attorney, as Amici Curiae on behalf of Petitioner.

Richard W. Younkin, William B. Donohoe, Dexter W. Young, James J. Vonk, Richard A. Krimen, Michael J. Brodie, Arthur Hershenson, Fernando Da Silva and Frank Evans for Respondents.

C. Gordon Taylor, Evans, Dalbey & Cumming, Barry F. Evans and Stafford Leland as Amici Curiae on behalf of Respondent State Compensation Insurance Fund.

OPINION

BIRD, C. J.—Does the 1977 amendment to Labor Code section 5500.5, which limits the employers and compensation insurers among whom liability for cumulative injury

and occupational disease claims may be apportioned, violate the contract clause of the United States and California Constitutions?

I.

Kenneth Atkinson was employed as a fireman by the City of Torrance (City) from July 20, 1956, to April 30, 1977. For fifteen of the twenty-one years that Atkinson worked for the City, the State Compensation Insurance Fund (State Fund) was the workers' compensation insurer for the City. Since July 1, 1971, the City has not carried insurance.

On March 12, 1978, Atkinson died of lung cancer. Subsequently, his fifteen-year-old daughter Christine filed an application for workers' compensation death benefits against the City and the State Fund. Christine claimed that her father's death was proximately caused by a cumulative injury which developed during the course of his employment with the City.

After lengthy negotiations, the City settled the Atkinson claim for $28,165.49. Thereafter, contribution was sought from the State Fund for 72 percent (15/21sts) of the settlement amount. The City based its claim on section 5500.5 of the Labor Code.[1]

Section 5500.5 was enacted in 1951 to codify the rule announced by this court in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [172 P.2d 884]. (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 327 [152 Cal.Rptr. 459, 590 P.2d 35].) As originally enacted, the section provided that an employee claiming benefits for an occupational disease could recover against any one of the successive employers whose employment contributed

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[1]All statutory references are to the Labor Code unless otherwise indicated.

to the disease. Also, any of the successive insurance carriers that provided coverage during such employments were liable.[2] The employer or insurer held liable had the burden of seeking the apportionment of this liability among the many other responsible employers and insurers. (Stat. 1951, ch. 1741, § 1, p. 4154; see *Flesher v. Workers' Comp. Appeals Bd., supra.*)

In 1973, section 5500.5 was amended to limit liability for occupational disease or cumulative injury to the five years of employment immediately preceding either the date of injury or the last date on which the employee worked in an occupation which exposed him to the hazards which caused the occupational disease or cumulative injury. (Stats. 1973, ch. 1024, § 4, p. 2032.) Apportionment of liability to earlier years was forbidden except where "the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer . . ." (*Id.* at p. 2034.) In such circumstances, liability could be extended to "all insurers who insure[d] the . . . compensation liability of such employer, during the entire period of the employee's exposure with such employer . . . ." (*Ibid.*)[3] This provision,

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[2]Although not codified in section 5500.5 until 1973, this rule was applied to cumulative injury claims as well. (See, e.g., *Fireman's Fund Indem. Co. v. Ind. Acc. Com.* (1952) 39 Cal.2d 831, 835 [250 P.2d 148]; *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 63 [45 Cal.Rptr. 1, 403 P.2d 129]; see also Stats. 1973, ch. 1024, § 4, p. 2032.)

[3]The full text of this exception read as follows: "If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workmen's compensation liability of such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.

"The provisions of this subdivision shal expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date."

which came to be known as the "single employer exception," continued the rules which had previously been in effect for certain employers.

In 1977, the section was again revised. The 1977 amendment provided for the stepped reduction of the five-year limitation of liability to one year by 1981 and repealed the "single employer exception." (Stats. 1977, ch. 360, § 1, p. 1334.) By its terms, the amendment was applicable to all cumulative injury and occupational disease claims filed on or after January 1, 1978. (*Ibid.*)[4]

In the contribution proceedings held by the Workers' Compensation Appeals Board (Board), it was undisputed that the State Fund was liable for 72 percent of the Atkinson settlement under the provisions of section 5500.5 which were in effect prior to the 1977 amendment. It was also undisputed that if the 1977 amendment were applied, the

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[4]As amended by Statutes 1977, chapter 360, section 1, page 1334, Labor Code section 5500.5, subdivision (a) provides: "(a) Except as otherwise provided in Section 5500.6 [which applies to household employees], liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

"For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

". . . .

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years . . . ."

City, as a legally uninsured employer, was solely liable for the settlement.

Relying on the 1977 amendment, the State Fund moved for dismissal of the case. The City opposed this motion and argued that the 1977 amendment violated the state and federal prohibitions against impairment of contracts since it abrogated the State Fund's alleged preexisting contractual obligation to contribute to the settlement. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) The Board granted State Fund's motion and denied the City's subsequent petition for reconsideration. The City now seeks review of the Board's decision.

II.

This court must decide whether the 1977 repeal of the "single-employer exception" to section 5500.5 violates the contract clauses of the United States and California Constitutions.

The language of these clauses "appears unambiguously absolute . . ." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 240 [57 L.Ed.2d 727, 733, 98 S.Ct. 2716].) "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ." (U.S. Const., art. I, § 10.) "A . . . law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) Read literally, these provisions appear to proscribe any impairment. However, it has long been settled that the proscription is "not an absolute one and is not to be read with literal exactness like a mathematical formula." (*Home Bldg. & L. Assn. v. Blaisdell* (1934) 290 U.S. 398, 428 [78 L.Ed. 413, 423, 54 S.Ct. 231, 88 A.L.R. 1481].)

As the United States Supreme Court recently stated, "it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States.

'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . .' [Citation.] As Mr. Justice Holmes succinctly [stated] . . . 'One whose rights,such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.' " (*Allied Structural Steel, supra,* 438 U.S. at pp. 241-242 [57 L.Ed.2d at p. 734].)

Thus, a finding that the state in the exercise of its police power has abridged an existing contractual relationship does not in and of itself establish a violation of the contract clause. It is the beginning, not the end of the analysis. A finding of impairment merely moves the inquiry to the next and more difficult question—whether that impairment exceeds constitutional bounds. Obviously, if the contract clause is to have any substance, it must place some limits upon the state's exercise of the police power. (*Allied Structural Steel, supra,* 438 U.S. at p. 242 [57 L.Ed.2d at pp. 734-735].)

In applying these principles to the present case, this court's first inquiry must be whether the repeal of the "single employer exception" impaired the obligations of the City's insurance contracts with State Fund. "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . . ." (*Home Bldg. & L. Assn. v. Blaisdell, supra,* 290 U.S. at p. 431 [78 L.Ed. at p. 425], citing *Sturges v. Crowninshield* (1819) 17 U.S. (4 Wheat.) 122, 197-198 [4 L.Ed. 529, 549].)

The City contends that it paid the State Fund valuable consideration in the form of insurance premiums. In return, the State Fund allegedly promised to pay benefits for that portion of any cumulative injury attributable to the period during which coverage was provided to the City. It is undisputed that the repeal of the "single employer exception" to section 5500.5 operated to release to a substantial degree the State Fund from this obligation. As a result of the repeal, the State Fund was no longer obligated in every case to pay for that portion of a cumulative injury which was incurred during the time its policies were in effect.[5] Therefore, if the City's characterization of the obligation assumed by the State Fund pursuant to its insurance contracts is correct, the repeal must be found to have impaired the obligations of the City's contracts.

On closer examination, it is apparent that the City's characterization of the State Fund's obligation is not accurate. Pursuant to its insurance contracts with the City, the State Fund agreed "to pay promptly and directly to any person entitled thereto under the Work[ers'] Compensation Laws . . ., and as therein provided, any sums due for compensation . . .; to be directly and primarily liable . . . to pay the compensation, if any, for which the [City] is liable . . .; and [to] be bound by and subject to the orders, findings, decisions or awards rendered against the [City] under the Work[ers'] Compensation Laws. . . ." (See Ins. Code, §§ 11651, 11654.)

Clearly, the *only* obligation the State Fund assumed was the obligation to pay what the workers' compensation law

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[5]For example, if a worker's last injurious exposure were found to have taken place during the period that State Fund insured the City, State Fund would remain obligated to pay all or part of any compensation award under the 1977 amendment to section 5500.5. (See *ante*, fn. 4.)

required. Did this promise encompass the text of that law as it existed when the insurance contracts were made, or did the parties recognize and intend that subsequent changes in the law be applied?

Ordinarily, " ' all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into a contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.' [Citation.]" (*Alpha Beta Food Markets v. Retail Clerks Union* (1955) 45 Cal.2d 764, 771 [291 P. 2d 433]; accord *Swenson v. File* (1970) 3 Cal.3d 389, 393 [90 Cal.Rptr. 580, 475 P.2d 852]; see also *Home Bldg. & L. Assn. v. Blaisdell, supra*, 290 U.S. at pp. 429-430 [78 L.Ed. at pp. 423-424].) "[L]aws enacted subsequent to the execution of an agreement," however, "are not ordinarily deemed to become part of the agreement *unless its language clearly indicates this to have been the intention of the parties*. [Citations.]" (*Swenson v. File, supra*, at p. 393, italics added.)

In *Swenson v. File, supra*, 3 Cal.3d 389, this court spoke to this issue. The case involved a covenant in a partnership agreement which was made in 1960. The covenant provided that a retired partner would not " 'render service to a client which has its principal office within a radius of twenty miles from any partnership office which existed on the date of his retirement.' " (*Id.*, at p. 392.) When the agreement was made, this provision was invalid under section 16602 of the Business and Professions Code to the extent that it restricted a former partner from competing for clients located in areas beyond the boundaries of the cities or towns where the partnership had its offices. (*Ibid.*) A year later, that statute was revised to permit countywide restrictions. Shortly thereafter, the defendant withdrew from the partnership and went

into business in the same county. (*Id.*, at pp. 391-392.) The *Swenson* court held that the covenant could not be interpreted as incorporating the revised statute. "[T]o hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions. [Citation.] We recognize that the parties could have originally agreed to incorporate subsequent changes in the law . . ., but there is no evidence that they did so in this case." (*Id.*, at pp. 394-395.)

Here, however, there is such evidence. First, the language of the agreements between the City and the State Fund clearly indicates that it was the intention of all the parties to incorporate subsequent changes in the law. "[W]hen an instrument provides that it shall be enforced according either to the law generally or to the terms of a particular . . . statute, the provision must be interpreted as meaning the law or the statute in the form in which it exists at the time of such enforcement." (14 Cal.Jur.3d, Contracts, § 173, p. 433, citing *United Bank & Trust Co. v. Brown* (1928) 203 Cal. 359, 362-363 [264 P. 482].) Moreover, at oral argument in this case, the City agreed that it was the parties' intention to incorporate subsequent changes in the law in their insurance agreements.

Since the City originally agreed to incorporate subsequent changes in the law of workers' compensation in its insurance agreements with the State Fund, it cannot complain that those changes impaired the State Fund's obligations. The City had every reason to anticipate that its rights under those agreements would change over time. It has no other legitimate contractual expectation. (Compare *Allied Structural Steel, supra*, 438 U.S. at pp. 245-246 [57 L.Ed.2d at p.

737]; see also *Veix v. Sixth Ward Assn.* (1940) 310 U.S. 32, 38 [84 L.Ed. 1061, 1065, 60 S.Ct. 792].)

The decision of the Workers' Compensation Appeals Board is affirmed.

Richardson, J., Newman, J., Kaus, J., Broussard, J., and Reynoso, J., concurred.

MOSK, J.—I dissent.

The issue in this case is whether an amendment to section 5500.5 of the Labor Code in 1977[1] results in the impairment of a workers' compensation insurance contract, in violation of the United States and California Constitutions.[2]

The workers' compensation law requires an employer to pay benefits to an employee injured as the result of continuous trauma or occupational disease incurred in the employment. Prior to the amendment of section 5500.5 in 1977, the liability for such benefits was divided among various employers (with certain limitations) in proportion to the period of time the employee was exposed to the risk in each employment. The workers' compensation insurer was liable for these pro rata benefits.

Subdivision (d) of the section provided before 1977 that if the employment was for a period longer than five years, each successive insurer of the employer during the period of cumulative injury was liable for the payment of benefits for the period during which the policy was in force. In 1977 subdivision (d) was repealed, with the result that an employer whose employee had suffered cumulative injury while a policy was in effect but who later became self-insured was required to pay compensation attributable to a period during which it had paid premiums for a policy to cover the risk of such injury.

Kenneth Atkinson died on March 12, 1978, from lung cancer. His only surviving dependent, his 15-year-old

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[1]All references are to the Labor Code, unless otherwise noted.

[2]Article I, section 10, of the United States Constitution provides, "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."

Article I, section 9, of the California Constitution similarly mandates that "A . . . law impairing the obligation of contracts may not be passed."

daughter Christine, filed an application for workers' compensation death benefits against the City of Torrance (City) and the State Compensation Insurance Fund (State Fund). She alleged that his death resulted from cumulative trauma and exposure to carcinogens during his employment by City as a fireman from July 20, 1956, through April 30, 1977. State Fund had insured City for workers' compensation liability from a time prior to 1956 through June 30, 1971. Since that date City has been self-insured. If section 5500.5, subdivision (d), had not been repealed in 1977, State Fund would have been liable for the payment of benefits for 15 of the 21 years of Atkinson's employment.

City settled the Atkinson claim for $28,165.49, reserving the right to seek contributon from State Fund, which agreed to pay 72 percent of the settlement if the 1977 amendment to section 5500.5 were held to be unconstitutional. I believe that it is unconstitutional as applied in this case.

The legislative revision of section 5500.5 in 1977 was no mere minor alteration. It accelerated reduction (through 1981) of the five-year period of employer (and insurer) liability to one year, and eliminated the "single employer exception" by repealing subdivision (d). According to the report of a legislative committee which considered the proposed amendment, the purpose of reducing the period of exposure for individual risks to one year was to permit "loss experiences to be more closely reflected in current dollars." The report went on to point out that a major consequence of the bill would be a dramatic shift of liability for cumulative injuries: "To the extent that the shift is from one insurer to another, and assuming that each has a fairly representative spectrum of risks, the net fiscal impact of enactment of [the bill] would appear relatively insignificant. To the extent that an insurer is absolved of liability in one

case, he may be presented with a larger liability on another. The net effect may be a 'wash.' "

On the other hand, "if an employer has recently become self-insured, he may be held fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. Opponents argue that since they paid their premium on an 'occurrence' basis and are entitled to contribution under existing law, it would be unfair for the Legislature to absolve those workers' compensation insurers of liability and shift that loss to the self-insured employer."

As to the financial amounts involved in this shift, the report stated: "The exact amount . . . is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period of 1978 through 1981. Of this amount, it is estimated that $15.3 million will be shifted to private self-insurers and $37.4 million shifted to public agencies." The analysis concluded that "the greatest fiscal impact appears to be on those public agencies who were formerly covered by the State [Fund]." (Assem. Com. on Finance, Insurance and Commerce, Interim Hgs. on Assem. Bill No. 155 (Apr. 27, 1977) p. 4.) That, of course, is the predicament of the City of Torrance.

The first step in determining the merit of City's assertion that the deletion of the "single employer exception" results in an unconstitutional impairment of its contract with State Fund is to decide whether the policy covered the injury sustained by Atkinson. The policy, in accordance with provisions of law, required State Fund to be "liable to employees . . . or in the event of death, to their dependents, to pay the compensation . . . for which the insured is

liable."[3] Since City was liable for "cumulative trauma" suffered by its employees, it follows that State Fund also incurred such liability.

State Fund contends, however, that the repeal of the "single employer exception" in 1977 did not affect its obligation to provide benefits for injuries which occurred during the time its policy was in force. That is, it argues, since a cumulative injury occurs when the employee first suffers disability and knows that the disability is caused by his employment (§§ 3208.1, 5412), Atkinson was not injured while State Fund insured City, but thereafter, while City was self-insured. Thus, the 1977 amendment only deprived City of its right to seek contribution for the portion of the injury sustained by Atkinson during the time the State Fund policy was in effect.

But the rule that liability for cumulative injuries must be apportioned among successive employers and their insurers has long prevailed in this state (e.g., *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 64 [45 Cal.Rptr. 1, 403 P.2d 129]), and the parties are presumed to have recognized its existence at the time they entered into the insurance contract. Thus, the premiums paid by City to State Fund during the period the policy was in effect were based on the assumption that State Fund would be liable for any portion of a cumulative injury incurred by City's employees during the period of policy coverage even though the employee's disability may not have occurred until a later time. It is clear, therefore, that the parties had bound themselves to a contract which, at the time it was made, and until the amendment of section 5500.5 in 1977,

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[3]Section 11651 of the Insurance Code provides that every contract of workers' compensation insurance shall provide that the insurer will be liable for payment of compensation for which the employer is liable, subject to the provisions of the policy.

obligated State Fund to reimburse City for its apportioned share of cumulative trauma claims.

State Fund argues that a workers' compensation contract is subject to policy considerations and that the Legislature may, by statute, affect the rights of the parties under such a contract. In support of this assertion, it cites cases from California and other jurisdictions, and points to the fact that the policy of insurance provided that it was to be governed by the workers' compensation laws. The majority opinion leans heavily on that proposition.

But the cases relied upon for this proposition are inapposite. In *Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27 [230 P.2d 637], between the time the decedent had incurred a cumulative injury and the date of his death in 1948, the Legislature had increased the benefits payable to an employee. The employer claimed that the award of compensation on the basis of rates in effect in 1948 impaired the obligation of its contract with the deceased employee because at the time of hire the parties "dealt in contemplation" of the statutes in existence when the injury was incurred and those statutes had become an integral part of the employment contract. It was held that the right to workers' compensation was not founded upon contract, but upon statutory rights and duties arising from the employer-employee relationship, and that such rights are imposed by the law as incidents of that status. (See also *McAllister v. Bd. of Education* (1963) 79 N.J. Super. 249 [191 A.2d 212, 218]; *Schmidt v. Wolf Contracting Co.* (1945) 269 App.Div. 201 [55 N.Y.S.2d 162, 167-168].)

In the present case, however, the issue is not the liability of an employer for compensation to his employee, but whether the state may by statute relieve an insurer of its obligation to indemnify the employer for a risk which the insurer had agreed to bear and for which the employer had

paid premiums.[4] Obviously, the relationship of an employer to its workers' compensation carrier is fundamentally contractual in nature. Efforts by the Legislature to affect that relationship are subject to constitutional limitations.

Since the 1977 legislation relieved State Fund of obligations it would have had prior to the amendment, the elimination of the "single employer exception" amounted to an impairment of contract. Admittedly not every contractual impairment violates the constitutional mandate; under some circumstances impairment has been held to be justified.

The seminal case in contract clause analysis is *Home Building and Loan Assn. v. Blaisdell* (1934) 290 U.S. 398 [78 L.Ed. 413, 54 S.Ct. 231, 88 A.L.R. 1481], in which the United States Supreme Court upheld a state act that placed a moratorium on foreclosures during the Great Depression. To justify the impairment of contractual obligations in that case, the court found four factors to be significant: (1) an emergency existed, as declared by the Legislature; (2) the legislation was addressed to a legitimate end—the protection of basic interests of society—and was not enacted for the advantage of particular individuals; (3) the legislative changes were appropriate to the emergency and were based on reasonable conditions; and (4) the legislation was temporary in operation and limited to the emergency. (*Id.* at pp. 444-447 [78 L.Ed. at pp. 432-433].)

In later cases, the high court has discussed additional factors to be considered in determining whether an impairment violates the Constitution. Governmental acts are sub-

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[4]Nor does *State of California v. Industrial Accident Commission* (1959) 175 Cal.App.2d 674 [346 P.2d 861], support State Fund's position. There, the Legislature repealed a statute giving insurers a right of contribution from the Subsequent Injuries Fund under some circumstances—a right which was purely statutory rather than contractual in nature.

ject to a stricter level of scrutiny when a "substantial impairment" is found. In such a situation, a "careful examination of the nature and purpose of the state legislation" must be conducted, keeping in mind that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244-245 [57 L.Ed.2d 727, 736-737].)

Another circumstance which calls for stringent review is if the legislation modifies the government's own financial obligations. The deference traditionally given to a legislative assessment of reasonableness and necessity is not appropriate in that circumstance "because the State's self-interest is at stake." (*United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 26 [52 L.Ed.2d 92, 112, 97 S.Ct. 1505]; *Sonoma County Organization of Public Employees v. County of Somona* (1979) 23 Cal.3d 296, 310 [152 Cal.Rptr. 903, 591 P.2d 1] [hereinafter *Sonoma County*]; see *Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87 [3 L.Ed. 162].)

In applying these standards to the contract in question, we must first decide whether the state was attempting to modify its own obligations. While the state itself is not a party to this proceeding, the State Fund, an autonomous state agency, is involved. Organized and established by the Legislature in 1914, pursuant to the provisions of article XX, section 21, of the California Constitution, the State Fund has been regulated and supervised directly since that time by the state Insurance Commissioner. (*See Gilmore v. State Comp. Ins. Fund* (1937) 23 Cal.App.2d 325, 329 [73 P.2d 640].) Sections 11770 through 11881 of the Insurance Code provide extensive rules regulating the organization, powers, rates, policies, reports and other rights and duties of the State Fund. The board of directors of the State Fund is appointed by the Governor (*id.*, § 11770), and its em-

ployees are civil servants. Furthermore, the State Fund is authorized to receive specific appropriations from the Legislature. (*Id.*, § 11773.) This relationship between the state and State Fund makes the state a direct beneficiary of the 1977 legislative changes, and heightens the level of scrutiny that we must apply.

The case for stricter scrutiny is buttressed if the contractual impairment is determined to be severe. In *Allied Structural Steel* the high court invalidated Minnesota's Private Pension Benefits Protection Act when it found its effect on contractual obligations severe. There a basic term of the pension contract was retroactively modified. The court stressed the element of reliance as a key ingredient in measuring severity, particularly in the context of pension and insurance funds. " 'These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contribution charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. *Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.*' " (Italics added.) (*Allied Structural Steel Co. v. Spannaus, supra*, 438 U.S. at pp. 246-247 [57 L.Ed.2d at p. 738], quoting from *Los Angeles Dept. of Water & Power v. Manhart* (1978) 435 U.S. 702, 721 [55 L.Ed.2d 657, 673, 98 S.Ct. 1370].)

As was the case in *Allied Structural Steel*, the statutory changes which removed the single employer exception in 1977 "nullifie[d] express terms" of the State Fund's contractual obligations with the City and "impose[d] a com-

pletely unexpected liability in potentially disabling amounts." (*Id.*, at p. 247 [57 L.Ed.2d at p. 738].) When the City became self-insured in 1971, it reasonably and justifiably relied on State Fund's honoring its contractual commitments, including the incurred but not reported loss reserve to cover anticipated cumulative trauma claims. The law in effect at that time mandated that State Fund be responsible for such future claims, and that law was part of the contract by which to measure the obligations of the parties. This has been made clear in every California case on the subject. (See, e.g., *Interinsurance Exchange v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142 [23 Cal.Rptr. 592, 373 P.2d 640]; *Alphs Beta Food Markets v. Retail Clerks* (1955) 45 Cal.2d 764, 771 [291 P.2d 433] (cert. den. 350 U.S. 996 [100 L.Ed. 861, 76 S.Ct. 547]); *Bell v. Minor* (1948) 88 Cal.App.2d 879, 881 [199 P.2d 718].) Thus, the 1977 changes attempted to shift unforeseen and formidable liabilities to the City, the severity of which in terms of millions of dollars cannot be doubted.

Accordingly, in applying the *Blaisdell* factors to this case we should observe stricter scrutiny because *the contractual impairment is severe and the state is attempting to modify its own obligations.*

The first part of the *Blaisdell* test—a legislative declaration of emergency—is a "threshold" hurdle that the state must overcome. (*Sonoma County, supra*, 23 Cal.3d at p. 312.) In *Sonoma County* the Legislature had specifically included a declaration of fiscal emergency, but we found insufficient factual evidence to support such a conclusion. In the case before us, there is nothing in the record to indicate that an emergency justified the repeal. Analysis of the other *Blaisdell* criteria adds no more support to State Fund's position.

The remaining factors of the analysis require a showing that the legislation was enacted to protect basic interests of society, were based on reasonable conditions, and were temporary in duration. The legislative acts here, as those in *Allied Structural Steel*, were not enacted to deal with a broad, generalized economic or social problem. (See *Allied Structural Steel, supra*, 438 U.S. at p. 245 [57 L.Ed.2d at pp. 736-737].) Moreover, the cost shift effected by the legislation was total and irrevocable rather than merely temporary in nature.

State Fund and amicus curiae urge that the 1977 revisions were necessary to "streamline procedures" and "reduce litigation costs and delay." As to the effect on litigation, however, there is no showing that the "single employer exception" had any negative impact on an applicant's ability to obtain benefits in a just and expeditious fashion. And the need to "streamline procedures" is obviously insufficient to justify the severe impairment which occurred here. The streamlining for State Fund is at the expense of a substantial burden upon the City.

The board and State Fund claim that the 1977 legislation was justified as an exercise of the police power; they suggest that when the state acts under this plenary power, contractual obligations can be impaired at will. It is of course true that the contract clause does not obliterate the police power of the state. (*Allied Structural Steel, supra*, 438 U.S. at p. 241 [57 L.Ed.2d at p. 734].) We have pointed out that "The state's police power remains paramount, for a legislative body 'cannot "bargain away the public health or the public morals." ' " (*Sonoma County, supra*, 23 Cal.3d at p. 305, quoting from *Blaisdell, supra*, 290 U.S. at p. 436 [78 L.Ed. at p. 428].) However, it is equally true that "if the contract clause is to have any effect, it must limit the exercise of the police power to some degree." (*Sonoma County, supra*, 23

Cal.3d at p. 305.) In my view the Legislature exceeded the limits of its power here.

I would hold that section 5500.5 is unconstitutional insofar as it relieves State Fund of its obligation to pay death benefits attributable to Atkinson's employment during the time it provided workers' compensation insurance to City. I would annul the board's decision.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

City of Torrance, Petitioner vs. Workers' Compensation Appeals Board of the State of California; State Compensation Insurance Fund, Respondents. Civil No. 59479. (WCAB No. 78 MON 20351).

Filed: October 27, 1981.

PETITION for Writ of Review of a decision by the Workers' Compensation Appeals Board. Affirmed.

Kegel, Tobin & Hamrick and David E. Lister for Petitioner.

James P. Jackson, John H. Larson, Milton J. Litvin, Daniel E. McCoy, Kendig, Stockwell & Gleason, Eugene L. Stockwell, Jr., Owens O'Keefe Miller, Herrick, Lundgren, Hays, Shaffer & Lancefield and John C. Shaffer, Jr., as Amici Curiae on behalf of Petitioner.

Richard W. Younkin, William B. Donohoe and Dexter W. Young for Respondent Workers' Compensation Appeals Board.

Vonk, Krimen, Hershenson & Evans and Frank Evans for Respondent State Compensation Insurance Fund.

Evans, Dalbey & Cumming, Barry F. Evans, Stafford Leland and C. Gordon Taylor as Amici Curiae on behalf of Respondents.

The sole issue here is whether certain portions of the amendments to Labor Code section 5500.5 by Statutes 1977, chapter 360, section 1, page 1334, are an unconstitutional impairment of contract under article I, section 10 of the

United States Constitution[1] and article I, section 9 of the California Constitution.[2]

This proceeding arises out of a claim by the heir of Kenneth Atkinson, who died on March 12, 1978, allegedly as the result of repetitive and cumulative trauma and exposures during his employment by the City of Torrance as a fireman from July 20, 1956, through April 30, 1977. The Atkinson petition joined the City and the State Compensation Insurance Fund as defendants. The State Fund had insured the City for workers' compensation liability from a time prior to July 20, 1956, through June 30, 1971. Since that time the City has been self-insured.

The City settled the Atkinson claim for a cash payment of $28,165.49, reserving the right to seek contribution from the Fund, which agreed that it would pay 72% of the total if the 1977 amendment were held to be unconstitutional.

The Fund made a motion for dismissal upon the ground that its coverage of the City of Torrance ended prior to July 1, 1971, and that under the 1977 amendment to Labor Code section 5500.5, it was not liable for any part of the Atkinson claim. The Worker's Compensation Appeals Board granted the motion and dismissed the State Fund. The City then filed its petition in this court to review that order of dismissal.

We first review the development of the law on this subject in order to place the issue in its context.

In *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 327, the Supreme Court outlined the earlier history of section 5500.5:

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[1]"No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ." (U.S. Const., art I, § 10.)

[2]"A bill of attainer, ex post facto law, or law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.)

"[Labor Code] Section 5500.5 was enacted in 1951 to codify the rule announced in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 82 [172 P.2d 884], that an employee disabled by a progressive occupational disease may obtain an award for his entire disability against any one or more of his successive employers or insurance carriers and that those held liable have the burden of seeking apportionment. [Citations.] Originally, section 5500.5 was limited by its express language to occupational disease claims, but its procedures were applied by analogy to cumulative injury claims as well. [Citations.] In 1973, section 5500.5 was amended to expressly cover cumulative injury as well as occupational disease claims. (Stats. 1973, ch. 1024, § 4, p. 2032.)"

Prior to the 1973 amendments, section 5500.5 authorized joinder of every employer with whom the employee had been exposed to the hazards of the occupational disease; and the Worker's Compensation Appeals Board was required to apportion the liability among them. When a single employer had been insured by successive insurers during the period of exposure, liability was apportioned among them. (See *Royal Globe Ins. Co. v. Industrial Acc. Com.* (1965) 63 Cal.2d 60, 63.)

This system, which was unlike that used in most other states, (see 4 Larson, Workmen's Compensation Law (1981) § 95.21, pp. 17-79), created a procedural morass, as employers, insurers and their attorneys embarked on the task of tracing employment and insurance into the remote past. The 1973 amendment to section 5500.5 sought to ameliorate these problems by limiting liability for occupational disease or cumulative injury to those who had employed the worker during the five years immediately preceding the injury or the last date of hazardous employment, subject to an exception, commonly known as the single

employer rule, which is of particular interest in this case. That exception was in subdivision (d) of section 5500.5, which read as follows:

> "(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurers who insure the workers' compensation liability of such employer, during the entire perid of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.
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> "The provisions of this subdivision shall expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date." (Stats. 1973, ch. 1024, § 4, p. 2032.)

The 1977 amendments to section 5500.5 provided that the liability period would be reduced annually until January 1, 1981, when the liability period for cumulative trauma and occupational disease claims would be only one year.[3]

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[3]As amended by Statutes 1977, chapter 360, section 1, page 1334, Labor Code section 5500.5, subdivision (a) provides: "(a) Except as otherwise provided in Section 5500.6 [which applies to household employees], liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the

(footnote continued on following page)

The 1977 amendments also eliminated the one-employer rule of subdivision (d).

The 1977 amendment of section 5500.5 provides in subdivision (i): "The amendments to this section adopted at the 1977 Regular Session of the Legislature shall apply to any claims for benefits under this division which are filed or asserted on or after January 1, 1978, unless otherwise specified in this section."

The claim involved here was filed April 10, 1978, and the 1977 amendment is, by its terms, the applicable law. Under this statute the City of Torrance as a self-insurer is liable for the full amount of the award. Under the statutes which had been in effect prior to the operation of the 1977 amendment, the City would have been entitled to contribution from the State Fund, as an insurer during a portion of the time the employee had been exposed to the hazardous employment.

Before enacting the 1977 change in law, the Legislature had before it a report from the Assembly Finance, Insurance and Commerce Committee on Assembly Bill 155, which contained these amendments. The report explained "The

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next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

". . . .

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

function of the amendments to Labor Code section 5500.5 is to shorten the period of exposure for individual risks to one year thereby permitting loss experience to be more closely reflected in current dollars. The amendment is tantamount to converting a workers' compensation insurance policy from an 'occurrence' basis to a 'claims made' basis."

The report went on to point out that one of the consequences of the bill would be a shift of liability. The report stated: "To the extent that the shift is from one insurer to another, and assuming that each has a fairly representative spectrum of risks, the net fiscal impact of enactment of Assembly Bill 155 would appear relatively insignificant. To the extent that an insurer is absolved of liability in one case, he may be presented with a larger liability on another. The net effect may be a 'wash.' [¶] On the other hand, however, if an employer has recently become self-insured, he may be held fully liable for the payment of benefits for cumulative injury without being able to turn to a prior insurer for contribution in cases where the single employer exception applies. Opponents argue that since they paid their premium on an 'occurrence' basis and are entitled to contribution under existing law, it would be unfair for the Legislature to absolve those worker compensation insurers of liability and shift that loss to the self-insured employer. The exact amount of this shift is not known but it has been estimated by the insurance industry to be approximately $52.7 million for the period of 1978 through 1981."

It is this shift which is the basis of the City's contention that the 1977 amendment impaired the obligation of a contract. From 1956 to 1971 the City paid insurance premiums to the State Fund, during which time the law required the cost of a cumulative injury to be shared by all who had insured the City during any part of fireman Atkinson's exposure. The effect of the 1977 amendment was to relieve

the Fund of that potential liability. Before discussing the City's contention, we must examine the nature of the relationship between the parties involved in workers' compensation.

The duty of any employer to provide compensation for an injured employee arises from the California Constitution and the statutes enacted to carry out the constitutional mandate. Section 4 of article XIV of the state Constitution provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party."

Pursuant to that constitutional provision, and its predecessors dating back to 1911, the Legislature has created a system of compensation which has been revised and amended from time to time as the Legislature deems appropriate. One of the features of that system is, and long has been, that the employer must either be insured by a duly qualified insurer against liability to pay compensation or must qualify as a self-insurer by establishing its ability to administer and pay workers' compensation claims. (Lab. Code, § 3700.)

The insurance policy under which State Fund insured the City of Torrance during the period ending June 30, 1971, is attached to the City's petition to the Workers' Compensation Appeals Board for reconsideration. The policy, in substance, requires the insurer to pay what the law requires

to be paid under the Workers' Compensation Law.[4] This is the coverage which the law requires. (Ins. Code, §§ 11651, 11654.) It is not disputed that the period covered by the policy terminated on June 30, 1971, long before Atkinson's death.

We turn now to a consideration of what effect the change of law after the expiration of the policy period has upon the relationship between the State Fund and the City.

In carrying out its constitutional mandate to provide a system of workers' compensation insurance which makes "adequate provisions for the comfort, health and safety and general welfare" of workers and their dependants, the Legislature needs to modify the system from time to time. The evolution of social and economic conditions and the teaching of experience impel continual reexamination of the compensation system.

As changes in substantive and procedural law occur, whether by legislative enactment or judicial interpretation,

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[4]The policy states: "State Compensation Insurance Fund . . . does hereby agree . . . (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries, and for the reasonable cost of medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, apparatus and artificial members; to be directly and primarily liable to employees covered by this Policy, or in the event of their death, to their dependents, to pay the compensation, if any, for which the Insured is liable (except the increase in any award imposed under Labor Code section 4553 and 4557, or both, for serious and wilful misconduct of the employer or for injury to an employee under sixteen years of age and illegally employed at time of injury); and, as between the employees and the Fund, the notice to or knowledge of the occurrence of an injury on the part of the Insured shall be deemed notice or knowledge, as the case may be, on the part of the Fund; and jurisdicton of the Insured shall, for the purpose of the law, be jurisdicton of the Fund; and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the Insured under the provisions of the Workmen's Compensation Laws of the State of California . . . ."

some impact upon the insurer's risk is inevitable. A few examples will illustrate this truism.

The Legislature has from time to time changed the rate of compensation for disability; and it has long been recognized that the measure of compensation is governed by the law in force at the time the employee sustains an industrially caused disability. Thus in *Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, a disability occurring in 1948 as a result of exposure to silica hazards between 1923 and 1928 was held compensable under the statutes in effect in 1948. The employer contended that this result violated the contract impairment clauses of the California and federal Constitutions, arguing that the statutes in existence at the time of employment were a part of the contract of employment. The Court of Appeal rejected that argument, pointing out that the employer's duty to pay compensation was not contractual but statutory; and that the applicable rate was that which the law provided at the time the right to compensation came into existence. The court said at page 31: "Regardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability. It would seem that the law then in effect should govern the claimant's rights."

In *State of California v. Industrial Accident Commission* (1959) 175 Cal.App.2d 674, the employer and its compensation carrier were awarded partial indemnification from the California Subsequent Injuries Fund under a provision of Labor Code section 5500.5 which was then in force. While the state's proceeding to review that award was pending in the Court of Appeal, legislation deleting that provision of section 5500.5 went into effect, together with a legislative declaration that the deletion should apply retrospectively to

any cases pending before the Commission or the courts. Accordingly, the Court of Appeal ordered the Commission to annul the indemnification award.

The development of the law with respect to progressive occupational disease and cumulative trauma itself illustrates the impact of changes in the law upon the risks to which compensation insurers and self-insurers have been exposed.

It was decisional law, based on interpretation of pre-existing general statutes, that developed the concept that the employee disabled by occupational disease might, at his option, obtain an award for the entire disability against any one of successive employers or successive insurance carriers, who might then seek contribution from the other employers or carriers. (See *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79.) The impact of such a rule upon the liability of compensation carriers and self-insurers is obvious.

In 1951 that rule was codified in Labor Code section 5500.5.

Although section 5500.5 originally referred only to occupational disease, the courts interpreted that language as including cumulative traumas. (See *Freuhauf Corp. v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 569, 576.)

The 1973 amendment, discussed above, shifted liability from carriers whose policies had been in force during the earlier period to insurers who covered the last five years.

In *Harrison v. Workmen's Comp. Appeals Bd.* (1974) 44 Cal.App.3d 197 the issue was whether the five-year limitation applied to a pending case in which the injury had occurred prior to the effective date of the 1973 amendment. The court recognized that applying the amendment retrospectively might substantially affect the rights and liabilities of the employers who came within the five-year period.

Nevertheless, the court concluded that the Legislature intended the amendment to apply retrospectively, and accordingly, the court affirmed the Board's order dismissing those insurance carriers which had not provided insurance within five years prior to the date of injury.

In *Flescher v. Worker's Comp. Appeals Bd., supra*, 23 Cal.3d 322, the Supreme Court was required to interpret the five-year limitation in the 1973 amendment. In that case the worker had been disabled by cumulative injuries sustained in employment by several employers between 1934 and 1973. The Board interpreted the 1973 amendment as meaning that compensation for the cumulative injury was limited to the portion sustained during the five years immediately preceding the time he became disabled. The Supreme Court reversed, pointing out that the 1973 amendment did not limit the time period for which the worker might recover, but limited only the employers and insurance carriers who could be held liable. It does not appear that the constitutionality of the 1973 statutory shift of liability was raised in that case.

The development of workers' compensation law in this state and the principles discussed and applied in the cases cited above bring us to these conclusions:

Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law in

effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers.

The feature of the current law to which the City objects is simply the repeal of a provision which would have enabled the City to seek contribution from an insurer whose period of coverage expired June 30, 1971. That provision was repealed because of problems which it had raised, particularly the difficulty of establishing proper rates and adequate reserves for the incurred-but-not-reported liabilities which had been accruing. This change is consistent with the constitutional mandate to create a complete and effective system of compensation.

The change in law which relieved State Fund of an obligation which would have existed under the prior law, does not in any sense impair the obligation of any contract.

The order of the Board is affirmed.

CERTIFIED FOR PUBLICATION.

FILES, P.J.

We concur:

KINGSLEY, J.

McCLOSKY, J.

Opinion and Order Granting Reconsideration and Decision After Reconsideration.

Workers' Compensation Appeals Board, State of California.

Kenneth V. Atkinson, Deceased, Christine L. Atkinson, Daughter, by and through her Guardian ad Litem and Trustee, Terry Atkinson, Applicant, vs. City of Torrance, legally uninsured, Defendants. Case No. 78 MON 20351.

On November 29, 1979, defendant State Compensation Insurance Fund petitioned for reconsideration on the Findings, Award and Order of November 6, 1979, whereby its Motion for Dismissal was denied and it was found, inter alia, that the principal amount of the Compromise and Release between defendant City, legally uninsured, and applicant was reasonable, with defendant City awarded contribution against petitioner. Petitioner contends, in substance, that the workers' compensation judge erred in failing to grant its motion for dismissal (1) because it did not insure the employer within four or five years of the date relevant to determination of liability pursuant to Labor Code Section 5500.5(a), and (2) because the single employer exception of the Labor Code Section 5500.5(d), in effect before January 1, 1978, did not apply as there was a second employer, Hughes Aircraft Company, or (3) because the amendment to Labor Code Section 5500.5, effective January 1, 1978, which leaves out the single employer exception, is constitutional.

Based on our review of the record, including the following, reconsideration shall be granted to dismiss petitioner as a party defendant.

Labor Code Section 5500.5, effective January 1, 1978, provides in relevant part, as follows:

"(a) . . . liability for occupational disease or cumulative injury claims *filed or asserted on or after January 1, 1978*, shall be limited to those employers who employed the employee during a period of *four* years immediately preceding either *the date of injury*, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first . . ." (Emphasis Added)

Such section further provided for the eventual shortening of the period relevant to liability to one year. Up until such effective date, by the 1973 amendment, that period was five years. As the claim herein involves a cumulative injury, and it was filed after January 1, 1978, the later amendment applies. (See *Rountree v. Time, D.C., et al* (En Banc) (1979), 44 CCC 223.)

Labor Code Section 5412 provides as follows:

"The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee *first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.*" (Emphasis Added)

Before January 1, 1978, Labor Code Section 5500.5(d) provided in relevant part, as follows:

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for *more than five years with the same employer*, or its predecessors in interest, *the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable.* Liability in such circumstances shall extend to all insurers who insure the workmen's compensation liability of such employer, during the entire period of the

employee's exposure with such employer, or its predecessors in interest. *The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage.* As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured." (Emphasis Added)

By the 1977 amendments of Labor Code Section 5500.5, effective January 1, 1978, the single employer exception was dropped.

Our review of the record does not reveal that applicant either knew of his industrial disability or was last harmfully exposed within four (or five) years of petitioner's period of coverage. As the single employer exception is not in effect, petitioner was not a liable carrier and shall be dismissed as a party defendant. See *Santa Cruz v. WCAB (White)*, 44 CCC 1041.

The entire period of harmful cumulative exposure is considered when determining the injured employee's disability. (See *Flesher v. WCAB* (1979), 44 CCC 212.) The four year period is relevant only for determination of the respective liability of defendants. The convenience of considering only four years rather than the entire cumulative exposure and of not using the single employer exception of Labor Code Section 5500.5(d) in effect prior to January 1, 1978, does not deprive the remaining parties or party, of due process or equal protection of the law. (Cf. *Harrison v. WCAB* (1974), 39 CCC 857.)

In *Harrison*, the Court gave retroactive effect to the 1973 amendments to Labor Code Section 5500.5. In affirming the Appeals Board's decision, the Court noted as follows:

"The board also concedes that if the amendment is applied retrospectively, the rights and liabilities of employers who remain in the litigation may be sub-

stantially affected. This is so because, through application of the new statute, some employers who might otherwise have been found liable for contribution will escape liability, thus diminishing the amounts the remaining employers may recover by way of contribution.

"The board contends, however, that retrospective application of the new statute will not directly enlarge the liability of the employers and carriers involved. Whereas they may be required to assume a larger burden in some cases, yet in other cases these same employers and carriers will be absolved from any liability even though their employments may have contributed, in some degree, to an employee's ultimate disability . . . [*Harrison*, supra at p. 871]

* * *

"In light of the legislative history of the section and all other pertinent factors presented to us by the board, we do not find it difficult, in this instance, to ascertain and identify the intent of the Legislature, charged as it is with a constitutional duty to provide a workmen's compensation system which 'shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character . . .' (California Const., art. XX Section 21.) We agree with the board's opinion that the amended legislation was designed and introduced for the purpose of ameliorating the procedural morass which has faced the board in multiple defendant cases. Thus, it is clear that the purpose of the amendment was to remedy an immediate situation which was imposing undue delay and expense upon litigants and hardship upon disabled employees . . ." [*Harrison*, supra at p. 873]

The shortening of the relevant liability period in subsection (a) from five years to eventually one year, and the dropping of the single employer exception of the previous

subsection (d), by the amendment effective January 1, 1978, address the same needs as did the 1973 amendments approved by the Court in *Harrison*.

In her Opinion on Decision, the workers' compensation judge found that the later amendment to subsection (a) was consistent with *Harrison*, but that the dropping of the single employer exception was not. She opined as follows:

> "Where the harmful employment was with a single employer for more than five years, an exception was provided which permitted the solely liable employer to receive the benefit of insurance policies it had purchased covering the employment in question. Where the harmful employment is with a single employer over a period of more than five years, why should the employer be required to pay the entire claim itself? Why should the employer be precluded from collecting on the policies of insurance it bought and paid for to cover just such a liability accruing during the earlier years? To arbitrarily cut off such contract rights would indeed appear to deprive the insured of its property without due process of law.
>
> * * *
>
> "The amendment of Section 5500.5 effective 1/1/78, by failing to include the single-employer exception, would operate in this case as an *unjustifiable impairment of the obligation of the City's insurance contracts with State Fund* for the earlier years of the cumulative trauma claim herein." (Emphasis Added)

We do not agree. Aside from whether or not any impairment was justified for the reasons discussed in *Harrison*, it has not been established that there has been any impairment. Our review of the record does not reveal that the relevant contracts are in evidence. We must assume that by such contracts all petitioner agreed to was to insure defendant City's compensation liability for injuries occurring

during those years. It cannot be said that petitioner agreed to contribute to liability occurring after it was off the risk.

Even if defendant City had a right to contribution from petitioner by reason of the previous subsection (d), such right was not of common law origin and was not vested, but inchoate. When subsection (d) was not included in the amendment effective January 1, 1978, defendant lost its right to contribution, thereon based, for any matter where the claim was filed after such effective date. (Cf. *Subsequent Injuries Fund v. IAC (Koski)* (1959), 24 CCC 279, 281.)

As the amendments to Labor Code Section 5500.5 effective January 1, 1978, are constitutional, we need not discuss whether or not the Board has the jurisdiction to find a statute unconstitutional, or whether there was a second employer, herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration filed November 29, 1979, be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the Findings, Award and Order of November 6, 1979, be, and it is hereby, RESCINDED and the following Finding and Order substituted therefor as the Decision After Reconsideration of the Workers' Compensation Appeals Board.

FINDING OF FACT

1. State Compensation Insurance Fund is not a necessary party defendant herein.

ORDER

IT IS ORDERED that the motion of State Compensation Insurance Fund for dismissal as a party defendant herein be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that State Compensation Insurance Fund be, and it is hereby, DISMISSED as a party defendant herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Robert E. Burton

I CONCUR.

/s/ C. L. Swezey

/s/ Richard Younkin, Deputy

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA. Jan. 28, 1980

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD.

/s/ Patricia W. Domingo

[Seal] Workers' Compensation Appeals Board.

Report and Recommendation on Reconsideration.

CASE: 78 MON 20351

Kenneth V. Atkinson, Deceased; Christine Atkinson, Daughter by and thru her Guardian at Litem and Trustee, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund.

Romaine Harper, Workers' Compensation Judge.

Date of Injury: 7/20/56 - 4 30/77.

December 7, 1979.

Memel, Jacobs, Pierno & Gersh, by Stanley K. Jacobs Attorneys for Applicant.

Robert T. Hjelle, Attorney for State Compensation Fund.

Kegel & Tobin, by David E. Lister, for City of Torrance.

I

INTRODUCTION

In this cumulative trauma case involving only one employer, the State Compensation Insurance Fund moved for dismissal under *Labor Code* Section 5500.5, as amended effective January 1, 1978. If granted, the motion will limit liability to the last four years of employment, during which the employer was legally uninsured. The legal uninsured objected to the dismissal on the ground that the amendment is unconstitutional; that is, by leaving out the single-employer exception, the statute impairs the obligation of insurance contracts between the uninsured and the State Compensation Insurance Fund during the earlier years of the decedent's employment.

The applicant settled with the legal uninsured, and the settlement was approved by order dated June 4, 1979. The uninsured and the State Fund appeared upon the same date and stipulated that the principal amount of the Compromise

and Release is reasonable and that the State Fund agrees to contribute 72% thereof in the event its motion for dismissal is denied. Time was allowed for the parties to file Points and Authorities, the case thereafter to be submitted upon the issues of adequacy of Compromise and Release and motion of State Fund for dismissal.

On November 6, 1979 Findings and Award and Order issued finding that State Fund is a necessary party defendant herein, that the principal amount of the Compromise and Release is reasonable and that the contributive share of the State Fund is 72% (the share of costs being found at 50%).

Motion of State Fund for dismissal as a party defendant was denied and Award was issued in favor of the City of Torrance, legally uninsured, from which State Fund has filed a timely Petition for Reconsideration on the three usual statutory grounds.

II
JURISDICTION

Petitioners cite Article III, sub-section 3.5, of the *California Constitution*, at page 9, lines 20-27, and page 10, lines 1-7, of the petition. While not referred to in the briefs of the parties at the trial level, this Constitutional provision would appear to be determinative if the Workers' Compensation Appeals Board is an administrative agency. The provision reads as set forth in the Petition for Reconsideration, with some minor exceptions of capitalization and punctuation. According to the pocket part in West's Annotated California Constitution, the sub-section was proposed as an addition by Assembly Constitutional Amendment No. 25, 1977-78, and was approved by the people at the primary election held June 6, 1978. There are no annotations.

The Section provides that an administrative agency has no power to declare a statute unconstitutional (Cal. Const. Article III, Sec. 3.5, Sub-Sec. (b)).

Petitioner contends that the board is an administrative body and cites cases holding that the board has no power outside of those vested by the Constitution and the Workers' Compensation Act. The Act is said to be liberally construed and the Board vested with wide powers to the end that justice may be done in all cases.

Petitioner concedes that the board is "a court in legal effect" whose powers, however, must be exercised within the express powers granted by the Constitution and statute limiting jurisdiction (Petition, page 13, lines 19-24).

In its trial brief on jurisdiction, the legal uninsured argues that the board, as a court, has authority to determine constitutionality of a statute and has done so, citing a 1978 *Attorney General's Opinion*, 61 OPS. ATT. GEN. 46 on page 1 and several cases on pages 2 and 3 of Supplemental Brief of City of Torrance Re: Jurisdiction filed August 27, 1979. One of the citations is erroneous, and the case has not been found. In some of the cases, the Court of Appeal is ruling on constitutionality of a statute as applied by the Board.

The only case cited which seems to speak directly to the point is a Writ denied case, which is not properly cited under the rules of court. It is *Caress and Sons vs. WCAB*, 42 CCC 442, dated prior to the primary election held June 6, 1978 approving addition of Section 3.5 to Article III of the California Constitution. (In *Caress*, the Board issued a decision limiting liability to five years under Labor Code Section 5500.5, but defendant petitioned for reconsideration on the ground, inter alia, of denial of due process and equal

protection of the laws, the Board denied reconsideration and the Court of Appeal denied the petition for Writ of Review.)

The courts have long held that the board is a constitutional court which, in matters within its jurisdiction, acts as a judicial body and exercises judicial functions (see *Slotten vs City of Santa Monica*, 43 CCC 188 at 196, citing *Solari vs. Atlas-Universal Service, Inc.*, 215 Cal.App.2d 587, 28 CCC 277). These decisions precede the June 6, 1978 election referred to hereinabove.

The issue would seem to be whether the board is only a constitutional court of limited jurisdiction or is, at the same time, an administrative agency. If it is an administrative agency, then it "has no power . . . to declare a statute unconstitutional . . ." since the June 6, 1978 addition of Section 3.5 to Article III of the California Constitution. No definition of administrative agency per se is found in the Petition or the Points and Authorities, but Petitioner refers to Article IV, Sec. 4 of the California Constitution granting the Legislature power to vest jurisdiction over a workman's compensation program in an administrative body (Petition, page 7, line 23) and to provide for settlement of compensation disputes by an industrial accident commission (Id. page 8, lines 8-9). Petitioner also refers to Article III, Sec. 1, of the California Constitution providing for division of powers of government into legislative, executive and judicial departments and for separation of those powers (Id. page 9, lines 1-12).

III
CONSTITUTIONALITY

Petitioner contends the supplemental brief filed by the uninsured was untimely and should not have been considered (Id. page 23, lines 15-18). It is believed that the filing of this brief is within the discretion of the Board.

Petitioner argues that *Labor Code* Section 5500.5, as amended effective January 1, 1978, does not impair any contract between the uninsured and petitioner, since the uninsured terminated the insurance effective July 1, 1971, and the contractual obligations of petitioner arise only upon the filing or assertion of a claim (Id. page 26, lines 1-13). This is inferred to refer to the fact that this claim was not raised until the application was filed on April 10, 1978. Since the injury is for cumulative trauma commencing in 1956, this argument is believed to be without merit.

Petitioner argues it is well established that a statute is presumed to be constitutional (Id. page 14, lines 13).

Petitioner argues that the Legislature, after having considered the purposes and effect of the statute, enacted it to simplify and streamline compensation proceedings (Id. page 16) and that it affects all concerned equally (Id. pages 18-19 citing *Harrison vs. WCAB*, 44 Cal App 3d at 873).

Petitioner recognizes the constitutional principle that a statute may impair the obligation of contract if there is a compelling state purpose and argues that such purpose exists in cumulative trauma cases and is served by the statute (Id. pages 19 and 20, lines 1-2).

Petitioner distinguishes the case of *Sonoma County Organization of Public Employees vs. County of Sonoma*, 23 Cal. 3d 296, cited in the uninsured's trial brief commencing at page 11, line 24 (Id. pages 20-21), wherein the California Supreme Court found a prohibition against the distribution of State surplus funds to local public agencies who granted their employees salary increases in excess of that provided for State employees did impair the obligation of contracts between the public employers and their employees. "The court held the impact of the statute on the contract rights of the employees was severe, and the government agencies

did not meet their burden of establishing the existence of a fiscal crisis on which they relied for justification of the impairment" (Id. page 20, lines 16-20).

Petitioner argues that the statute in *Sonoma County* directly attacked the employment contracts, while the amendment to Labor Code Section 5500.5 does not, as it does not alter or extinguish any liability with regard to *specific* injury but merely affects the period of liability for *cumulative* injuries (emphasis by judge).

The judge agreed with the uninsured that the amendment, only by virtue of leaving out the single-employer exception, deprived the City of the benefit of the insurance contracts on which it had paid premiums and which undertook to cover its liability in just such claims as the present one. No such obligation of contract would appear to exist where there is more than one employer in a cumulative trauma claim, as the Labor Code then limits the liability of the *employer*. If the employer has no liability, then the employer has no claim against its insurance company.

The procedural difficulties inherent in a cumulative injury case with multiple employers would not seem to exist in any comparable degree where there has been only one employer. Ordinarily, employers would have records of their insurance carriers over the years, while employees may very well lose employment records and forget some of their past employments.

IV
PROCEDURAL MATTERS

Petitioner contends that the constitutionality of the amendment limiting liability to four years is moot, for if it is declared unconstitutional, the five year limitation of liability would apply and petitioner would still be excluded (Petition, page 22, lines 16-27, and page 23, lines 1-13).

This argument proceeds upon the assumption that there are two employers involved in this case, the City of Torrance and Hughes Aircraft Company. The fact is, however, that the only defendant employer is the City of Torrance. No motion for joinder of Hughes Aircraft Company is found in the record, although the informal minutes of January 15, 1979 ("appearance sheet") contains the handwritten note by the judge, "Note: Hughes Aircraft may have to be joined. Applicant may have moonlighted there."

Petitioner next contends that the award of contribution was without due process of law because at no time has the uninsured filed a petition for contribution (Id. page 25). This argument would appear to have no merit in view of the stipulations entered into by the uninsured and the State Fund on the record on June 4, 1979 (reasonableness of principal amount of compromise and release and agreement of State Fund to contribute 72% in the event its motion for dismissal as a party defendant is denied).

RECOMMENDATION: If the board is an "administrative agency" within the meaning of California Constitution Article III, Section 3.5, then it no longer has power to declare a statute unconstitutional, if it ever did. The status of the Appeals Board as an administrative agency has not been briefed by the parties. Therefore, no recommendation is made.

Respectfully submitted,

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

RH/gh

Opinion on Findings and Award and Order.

CASE: 78 MON 020351

Kenneth V. Atkinson, Deceased; Christine L. Atkinson, Daughter, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund.

Romaine Harper, Workers' Compensation Judge.

Date of Injury: 7/20/56-4/30/77.

November 5, 1979

Applicant daughter filed cumulative injury claim contending that her father died as a result of cumulative trauma arising out of his employment as a fireman from July 20, 1956 through April 30, 1977. The employer, City of Torrance (hereinafter "City"), was insured for workers' compensation liability by State Compensation Insurance Fund (hereinafter "State Fund") from 1956 through June 30, 1971 and was legally uninsured from July 1, 1971 through April 30, 1977.

The uninsured and the applicant entered into a compromise and release for $28,165.49, which has been approved as adequate. City and State Fund stipulated that the compromise and release figure was reasonable and that State Fund would contribute its pro-rata share of 72% in the event contribution was awarded. The case was submitted on the motion of State Fund for dismissal as a party defendant under *Labor Code* Section 5500.5 and opposition thereto by the City on the ground of alleged unconstitutionality of the 1977 amendment to *Labor Code* Section* 5500.5 eliminating the single-employer exception to the shortening of the period of liability for cumulative trauma.

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*All references herein to statute refer to the California Labor Code unless otherwise specified.

Prior to the amendment, the section limited liability for cumulative trauma to the last five years of exposure, unless the employee had worked for only one employer for more than five years, in which event all the different insurance carriers of that one employer would be liable. The amendment shortening the time to four years for claims filed in 1978 eliminated the single-employer exception.

State Fund has challenged jurisdiction of the appeals board to declare a statute unconstitutional, arguing that the separation of powers doctrine precluded this, because the appeals board is an arm of the executive branch of the government, while only the judicial branch has power to decide constitutionality.

The City contends that the appeals board has such jurisdiction (see Supplemental Brief of City of Torrance re Jurisdiction and cases cited therein).

Under the 1978 amendment liability would be limited to the last four years of exposure even though the decedent worked for only one employer throughout his employment as a fireman. If the application of the statute here is unconstitutional, then the single-employer exception incorporated into the statute before its amendment would apply, and all carriers of the City of Torrance during the decedent's employment would be liable.

Section 5303 provides, "There is but one cause of action for each injury . . . All claims . . . arising out of such injury may . . . be joined in the same proceedings . . ."

Section 5300(a) provides that proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, shall be instituted before the appeals board and not elsewhere, (with exception not here pertinent). Thus, the appeals board has jurisdiction over the City's claim for contribution from the State Fund.

Section 133 provides, "The Division of Industrial Accidents, including the Administrative Director and the Appeals Board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this Code."

Section 5310 provides that the Administrative Director may appoint general referees, who shall have the powers, jurisdiction and authority granted by law . . ."

Under the Sections cited, there would appear to be jurisdiction in the appeals board to declare the amendment of Section 5500.5, to the extent that it eliminates the single-employer exception, unconstitutional.

As pointed out in the brief of the City, Article I, Section 10 of the United States Constitution provides that no state may pass any law impairing the obligation of contract. The elimination of the single-employer exception, the City argues, impairs the obligation of the insurance contracts between it and the State Fund in the first fifteen years of the decedent's employment, contracts on valuable consideration consisting of the premiums paid. The City argues about the tremendous shift of liability to "single-employers" who initially bought workers' compensation insurance and then became self-insured or legally uninsured, the greatest fiscal impact appearing to be on public employers formerly covered by State Fund (see page 7 of Trial Brief of Defendant City of Torrance).

As pointed out in the United States Supreme Court cases cited by the City, a state law may impair the obligation of a contract if it is reasonably necessary to do so to serve an important public purpose.

The California Court of Appeal, First Appellate District, in *Harrison v. WCAB* (1974), 44 Cal.App.3d 197, 118 Cal.Rptr. 508, 39 CCC 867, found the earlier version of

Section 5500.5 limiting liability to the last five years of employment (except where there was a single-employer) to be reasonably necessary to prevent the expenditure of "time, effort, and money in tracing the applicant's employment history over the entire course of his adult life . . . (as) . . . bankrupt or disolved firms, and record destruction would often make this job difficult if not impossible." (39 CCC at 868).

Quoting further from the *Harrison* case, "Tracing insurance coverage for the many employers who might be involved in such claims presented virtually impossible tasks for the agency and for the parties involved in the claim. When a claim involving multiple employers and carriers finally reached the hearing stage, proceedings were often grossly encumbered by milling numbers of attorneys in the corridors and hearing rooms representing the numerous carriers and employers for the suit, each of whom had the right to appear to cross-examine the applicant and his witnesses." (39 CCC at 869).

Section 5500.5 was amended effective January 1, 1977 to limit liability for cumulative trauma to the last five years in order to facilitate discovery of employers and carriers and eliminate the appearance of hordes of attorneys representing them. The procedural problems referred to in *Harrison*, supra, prevented the speedy determination of the rights and liabilities of the parties mandated by *Cal Const. Art. XX, Sec. 21*. Substantive liabilities were changed; but it was thought that the overall liability of the various workers' compensation carriers would "even up" with the experience of a quantity of cases. No reason appears to doubt this prediction.

This shifting of liability to the employers during the last five years facilitated settlements and speeded disposition of cases and receipt of benefits by applicants. No impairment

of contract was involved. The earlier employers had no liability to the employee. As insureds, they had no loss; and so their carriers had no duty under the insurance contracts to pay.

Even though the liability for cumulative trauma was limited to the last five years, the entire period of employment was and is material to the issue of whether an injury has taken place. The last five years of so-called microtraumata might not have caused disability without the accumulated stresses and strains of the preceding years.

Where the harmful employment was with a single employer for more than five years, an exception was provided which permitted the solely liable employer to receive the benefit of insurance policies it had purchased covering the employment in question. Where the harmful employment is with a single employer over a period of more than five years, why should the employer be required to pay the entire claim itself? Why should the employer be precluded from collecting on the policies of insurance it bought and paid for to cover just such a liability accruing during the earlier years? To arbitrarily cut off such contract rights would indeed appear to deprive the insured of its property without due process of law.

It *is* due process of law, however, for the state to abrogate contract rights if the legislature has made a reasonable determination that an evil exists causing material harm to the public and the statute provides a reasonable means of correcting that evil and affects all in the same situation equally. The January 1, 1978 amendment to *Section* 5500.5 would appear reasonable in limiting liability to the last four years, then three, they two, etc. If it facilitates justice and speedy compensation to get rid of a horrendous procedural morass, then it must still be good to whittle down the procedural difficulties more and more.

Still, the search for insurance records of a single employer faced with a potential liability for cumulative trauma occurring during a period of fifteen or twenty years does not appear to threaten such a substantial and material harm to the people of the state as to warrant the outright destruction of rights under insurance contracts fully paid for and fully in force and effect but for such abrogation.* It would appear that the legislature, in providing for the single-employer exception in the earlier amendment, recognized this fact.

The amendment of *Section* 5500.5 effective 1/1/78, by failing to include the single-employer exception, would operate in this case as an unjustifiable impairment of the obligation of the City's insurance contracts with State Fund for the earlier years of the cumulative trauma claim herein.

Accordingly, the motion of State Fund for dismissal as a party defendant herein will be denied and Findings and Award for Contribution will issue commensurate with the stipulations of the City and State Fund entered in the minutes of June 4, 1979 herein.

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

RH/gh

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*Even if multiple carriers are involved, the single-employer should have his business records to identify them and settlements should not be deterred. By election against a carrier or uninsured, delay and hordes of attorneys may be avoided. The real difficulty for an employee traumatized by a long career of stressful employment was remembering and locating his many employers.

Findings and Award and Order.

Workers' Compensation Appeals Board, State of California.

Kenneth V. Atkinson, Deceased; Christine L. Atkinson, Daughter, by and through her Guardian ad Litem and Trustee, Terry Atkinson, *Applicant*, vs. City of Torrance, legally uninsured and State Compensation Insurance Fund, *Defendant*. Case No. 78 MON 20351.

Filed: November 13, 1979.

Applicant and the City of Torrance, legally uninsured, having filed Compromise and Release which was approved by Order of 6/4/79; State Compensation Insurance Fund having moved for dismissal herein under *Labor Code Sec.* 5500.5, as amended effective 1/1/78; and City of Torrance, legally uninsured, and State Compensation Insurance Fund having appeared and entered certain stipulation into the record; the Honorable ROMAINE HARPER, Workers' Compensation Judge, now finds, awards, and orders as follows:

FINDINGS OF FACT

1. State Compensation Insurance Fund is a necessary party defendant hereto.

2. The principal amount of the Compromise and Release herein between the City of Torrance, legally uninsured, and the applicant of $28,165.49 is reasonable.

3. The contributive share of State Compensation Insurance Fund herein for death benefits, burial expense and self-procured medical expense is 72%, or $19,550.38.

4. The contributive share of State Compensation Insurance Fund herein for medical-legal expenses for Reuben R. Merliss, M.D. and Memel, Jacobs, Pierno & Gersh is 50%, or $506.10.

5. The contributive share of State Compensation Insurance Fund herein for medical defense costs for appearance of Dr. Wandling herein on June 4, 1979 is 50%.

ORDER

IT IS ORDERED that motion of State Compensation Insurance Fund for dismissal as a party defendant herein be, and it hereby is, denied.

AWARD

AWARD IS MADE in favor of the City of Torrance, legally uninsured against State Compensation Insurance Fund of $19,550.38 plus $506.10 plus 50% of the costs for appearance of Dr. Wandling on June 4, 1979 herein, all payable forthwith.

Dated at SANTA MONICA, CALIFORNIA

NOVEMBER 6, 1979

/s/ Romaine Harper
ROMAINE HARPER
Workers' Compensation Judge

Declaration of David E. Lister.

I, David E. Lister, being deposed under penalty of perjury, do certify and say:

1. I am an attorney licensed to practice before all the courts of the State of California. I am a member of Messrs. Kegel, Tobin & Hamrick and represented the City at the oral argument before the California Supreme Court in the case which is presently on appeal to this Court.

2. The agreement between City and State Fund was the subject of extensive discussion at oral argument in the California Supreme Court. The Court questioned me, among other things, about changes in applicable compensation rates for injured workmen (For example, in 1981, the specified rate for the weekly maximum temporary disability rate was changed from $154 per week to $175.) I indicated changes in compensation benefits between the employer and employee was contemplated by the agreement. I did not indicate at the oral argument or in the briefs that the State could modify a different contractual arrangement, *i.e.* State Fund's contractual obligations to City of Torrance.

3. After reading the opinion of the California Supreme Court, I concluded that there could be an ambiguity in respect to the nature of the contractual changes agreed upon by the City. It was possible to construe the opinion as indicating that I had stated that the City had agreed to any and all possible changes in the Workers' Compensation Act. To clarify that possible ambiguity, we filed a petition for rehearing which was denied on October 13, 1982.

4. Subsequent to the denial of the petition for rehearing, I made efforts to obtain access to the tape recording of the oral argument to clarify that ambiguity. I requested permission to hear that tape personally and to have a certified shorthand reporter make a transcription of it. In response

to that request, I received a telephone call from Mr. Gill, Clerk of the Court, who advised me that the court would not permit any stenographic transcription of the tape. I confirmed that representation of Mr. Gill with my letter to him dated January 6, 1983.

5. On February 16, 1983, I was granted permission to listen to the tape recording and did so on February 23, 1983. All of the court's questions and my responses are set forth below in *haec verba* in connection with the issue whether the City had agreed to accept changes in the terms of its agreement with State Fund. Consistent with my recollection, except for changes in compensation benefit rates and types of injuries covered, there was no concession that the City agreed to accept any changes unilaterally imposed by the State. The questions and answers were as follows as copied from the tape:

> Q [Justice Newman]: What does the phrase mean "under the workman's compensation law and as therein provided" — are you saying that does not contemplate amendments?
>
> A [Mr. Lister]: It contemplates all kinds of amendments — increases in rates, increases in kinds of injuries that are found compensable. Legislation can increase rates without impairing contracts. Law cannot tamper with or abrogate rights of parties to private contracts — *the duty of the insurance company to its insured . . . exists despite amendments in other aspects of worker's compensation law.*
>
> Q [Justice Newman]: What is your authority for that proposition?
>
> A [Mr. Lister]: Our understanding of the federal and state constitution contract clauses. [emphasis added.]

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of February, 1983 at Los Angeles, California.

_____

David E. Lister

82-1436

No. A-559

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA; STATE
COMPENSATION INSURANCE FUND,

Appellees.

ON APPEAL FROM THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

APPELLEES' MOTION TO DISMISS OR AFFIRM

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WORKERS' COMPENSATION APPEALS BOARD
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Telephone: (415) 557-2250

Attorney for Appellee
Workers' Compensation Appeals Board

QUESTIONS PRESENTED

1. Did the 1977 amendment to Labor Code §5500.5 impair the City of Torrance's insurance contract with State Fund?

2. Whether there is a substantial federal question presented to this court; i.e., whether there is any contractual impairment which exceeds constitutional bounds?

PARTIES TO THE PROCEEDING

Appellant is the City of Torrance, California. Appellees are the Workers' Compensation Appeals Board of the State of California, a State agency with judicial power to hear and decide workers' compensation cases, and State Compensation Insurance Fund, a statutorily created insurance carrier authorized to transact workers' compensation insurance in the State of California.

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No. A-559

IN THE SUPREME COURT

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellee, Workers' Compensation Appeals Board of the State of California, pursuant to Supreme Court Rule 16.1(b), moves for dismissal of this appeal on the ground that it fails to present a

substantial federal question and further moves that the Court affirm the judgment below on the "ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument." (Supreme Court Rule 16.1(c).)

STATEMENT OF THE CASE

Kenneth Atkinson was employed as a fireman by the City of Torrance (City)* from July 20, 1956 to April 30, 1977. On March 12, 1978, Atkinson died of lung cancer. His 15-year-old daughter, Christine, filed an application for workers'

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* Other abbreviations will be used in this brief as follows:

"Labor Code," California Labor Code; "Juris. State. App.," Jurisdictional Statement Appendix; "Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19)," Proceedings of Assembly Committee on Finance, Insurance and Commerce Into Problems of Assuming Payments of Compensation for Cumulative Occupational Injuries, Interim Hearings (January 12 & 19, 1977).

compensation death benefits against the City of Torrance and State Compensation Insurance Fund ("State Fund").[1] Christine claimed that her father's death was proximately caused by a cumulative injury which developed during the course of his employment with the City. In the course of

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1 State Compensation Insurance Fund is a statutorily created "competitive insurance carrier" authorized to transmit workers' compensation insurance to the same extent as any other insurance carrier. (Cal. Ins. Code §§11775, 11778.) The State Fund is self-supporting and self-operating. It is a legal entity distinct from the State as such, and may sue or be sued in its own name, enter into all proper contracts and obligations, invest and reinvest its monies, and otherwise conduct its business and perform all acts necessary for its operation. See Cal. Ins. Code §11783: Burum v. State Compensation Ins. Fund, 30 Cal.2d 575, 188 P.2d 805 (1947). In Burum, the Court held a statutory requirement of filing a claim with the State Board of Control was inapplicable to the State Fund because a claim against the State Fund was not a claim against the State. The Court concluded it was "inescapable that the entire framework of the Fund -- its organizations, its powers, its duties and its obligations -- show it was designed to be self-operating, and with a special and unique character; ..." Id., at 586.

litigation, the City settled the Atkinson claim for $28,165.49. The City, relying on §5500.5 of the California Labor Code ("Labor Code"), sought contribution from State Fund for 72 percent of the settlement amount. The State Fund moved for its dismissal from the case because Labor Code §5500.5, as amended in 1977,[2] provided that occupational disease or cumulative injury claims filed or asserted after January 1, 1978, "shall be limited to those employers who employ the employee during period of four years immediately preceding either the date of injury, as determined pursuant to §5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first."

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2 See footnote 10, infra.

Although it was undisputed that if Labor Code §5500.5 as amended in 1977 applied, the City, as legally uninsured employer was solely liable for the settlement, the City opposed the motion arguing that the 1977 amendment violated the state and federal prohibitions against impairment of contract since it impaired obligations arising out of its insurance contract (policy) with the State Fund. A referee (workers' compensation judge) agreed with the City's contention and ordered State Fund's contributive share of the settlement to be 72 percent or $19,550.38. The Workers' Compensation Appeals Board reversed the referee[3]

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3 California Labor Code §111 vests judicial power in the Workers' Compensation Appeals Board consisting of seven members. Labor Code §5309 gives the Board the power to direct or order a "referee" to try the issues in proceedings before it and to make and file findings, orders, decisions or awards subject to the reconsideration process described in Labor Code §§5906 to 5911. "Referees" are given the working title

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indicating, aside from whether or not any impairment was justified by removal of burdens placed on the workers' compensation system, "it has not been established that there has been any impairment." Petitioner filed a writ of review with the Court of Appeal of the State of California, Second Appellate District, Division 4, and that court, in its opinion filed October 27, 1981 (Juris. State. App., at pp. 26 to 38), affirmed the Workers' Compensation Appeals Board concluding:

"workers' compensation judge" by the Board's Rules of Practice and Procedure (See Cal. Adm. Code, Title 8, §10302.) The California Constitution, Article III, §3.5, as adopted June 6, 1978, provides that an administrative agency has no power to declare a statute unconstitutional or refuse to enforce a statute on the basis of being unconstitutional. Thus, the Board's comment in its decision that: "As the amendments to Labor Code §5500.5 effective January 1, 1978 are constitutional, we need not discuss whether or not the Board has jurisdiction to find a statute unconstitutional ..." (Opinion & Order Granting Reconsideration and Decision After Reconsideration, Juris. State. App., p. 43.)

"Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

"In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law in effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers.

"The feature of the current law to which the City objects is simply the repeal of a provision which would have enabled the City to seek contribution from an insurer whose period

> of coverage expired June 30, 1971. That provision was repealed because of problems which it has raised, particularly the difficulty of establishing proper rates and adequate reserves for the incurred-but-not-reported liabilities which has been accruing. This change is consistent with the constitutional mandate to create a complete and effective system of compensation.
>
> "The change in law which relieved State Fund of an obligation which would have existed under the prior law, does not in any sense impair the obligation of 'any contract.'" (Juris. State. App., pp. 36-37.)

The City then filed a Petition for Hearing with the Supreme Court of the State of California which granted a hearing and, after oral argument, affirmed the decision of the Workers' Compensation Appeals Board finding that:

> "Since the City originally agreed to incorporate subsequent changes in the law of workers' compensation in its insurance agreements with the State Fund, it cannot complain that those changes impaired the State Fund's obligation. The City had every reason to anticipate that its rights under those agreements would change over time. It had no other legitimate

> contractual expectation." (Citation omitted.) (Juris. State. App., p. 13.)

The City has filed an appeal with this Court contending that its insurance agreement with the State Fund has been unconstitutionally impaired by the 1977 amendment to Labor Code §5500.5 in violation of the contract clause of the United States Constitution. Petitioner also requests the court to apply a stricter standard of review.[4]

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4 The contract under review is a private contract. The Board of Directors of the State Fund, with the exception of an ex officio chairperson, are appointed from the policyholders or the employees of policyholders and exercise power and authority over the State Fund in the same manner as a private insurance carrier. The management of the State Fund, its President, Executive Vice-President, and Vice-Presidents manage the transaction of workers' compensation insurance like any other insurer. (See Hanna, Calif. Law of Employee Injuries & Workers' Compensation, Vol I, 2nd Ed., §§2.04[4], p. 2-18, §2.04[5], pp. 2-17 and 2-18.) There is no financial liability for the State because the liability of the State Fund is limited to the

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INSURANCE CONTRACT

The contract in this case is a standard workers' compensation insurance policy, the same as issued to any employer by any workers' compensation insurance carrier. Since counsel for the appellant in its Jurisdictional Statement has misled the Court by deleting certain portions from the pertinent provisions of the insurance contract between the City and State Fund, (See pp. 5 and 15, Juris. State.), it is necessary to set forth those important portions which have been deleted. Under the policy the State Fund agrees:

"State Compensation Insurance Fund

Fund's assets. Cal. Ins. Code §11771. The stricter standard of review is not applicable and this Court may properly defer to the California Legislature's judgment as to the necessity and reasonableness of the 1977 amendment to Labor Code §5500.5. United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23; 97 S.Ct. 1505, 1518 (1977); Energy Reserves Group, Inc. v. Kansas Power and Light Co., 51 U.S.L.W. 4105 (1983), para. 11A.

> ... does hereby agree ... (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries, and for the reasonable cost of medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, apparatus and artificial members ... and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the insured under the provisions of the Workmen's Compensation Laws of the State of California ...." (Emphasis added.) (Juris. State. App., p. 33, footnote 4.)

HISTORY OF LABOR CODE SECTION 5500.5 AND RELEVANT COURT DECISIONS

Article XIV, §4, of the California Constitution provides, in relevant part:

> "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their

employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for the vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government ...." (Emphasis added.)

Pursuant to this constitutional provision, and its predecessors dating back to 1911, and consistent with changing theories of compensability, economic circumstances and even moral concepts, the Legislature of the State of California has amended, added and deleted sections of workers' compensation laws since 1917 when the Workers' Compensation Insurance Safety Act was passed. These amendments and additions to the workers' compensation laws have covered each and every provision mandated by Article XIV, §4, of the California Constitution including establishing rules of compensability, definitions of injury, dates of injury, dependency, contribution and limitations of liability. As far back as 1913, constitutional challenges to the system have been answered by reference to the constitutional mandate and police power. Western Indemnity Co. v. Pillsbury, et al.,

170 Cal. 686, 151 P. 398 (1915). In subsequent years, both the federal and state constitutionality of various provisions of the California Workers' Compensation Act has been frequently tested and its fundamental purposes have been upheld.[5] Consequently, this vast inter-related area of legislation affecting all the provisions mandated by the California Constitution, now represents a social system affecting the health, safety and well-being of the

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5 For a general discussion see Hanna, Calif. Law of Employee Injuries and Workmen's Compensation, Vol. 2, 2nd Ed., §2.02(2)(a-h), pp. 2-8 to 2-17.

More recent California Supreme Court decisions upholding the constitutionality of California workers' compensation laws include rejecting an equal protection challenge to Labor Code §4458(b) which treated fire fighters differently from other volunteer fire fighters by fixing a minimum rate of compensation, Meredith v. WCAB, 19 Cal.3d 777, 567 P.2d 746 (1977), and an equal protection challenge to a 1959 amendment to a statutory presumption for compensability of heart trouble which provided such heart trouble could not be attributed to pre-existing disease. City & County of San Francisco v. WCAB (Wiebe), 22 Cal.3d 103, 583 P.2d 151 (1978).

work force of the state. Further, the Legislature has continued to pass laws, both substantive and procedural, to carry out the provisions of the constitutional mandate.[6]

In 1951, the Legislature codified the decisional rule in Colonial Insurance Co. v. IAC, 29 Cal.2d 79, 172 P.2d 884 (1946)[7] by enacting Labor Code §5500.5 which purpose was to facilitate recovery for injuries due to progressive occupational diseases by providing that an injured employee might elect to proceed against one or more of his successive employers or insurance carriers for the entire consequence

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6 For summary of legislative action on workers' compensation law in 1982, see: Hanna, Workers' Compensation Laws of California, Effective January 1, 1983, Matthew Bender & Co., pp. vii to xiv.

7 In Colonial Ins. Co., there was one employer, Emsco Refractories Co., and nine insurance carriers with one period of uninsurance.

of his occupational disease even though that particular employment was not the sole cause of disability. This legislation also provided for contribution proceedings and a special presumption for silicotic exposure from employment in underground work.

Federal and state constitutional attacks against §5500.5 were rejected in Subsequent Injuries Fund v. IAC (Walters), 48 Cal.3d 365, 310 P. 7 (1951); Subsequent Injuries Fund v. IAC, 49 Cal.2d 354, 317 P.2d 8 (1957). The Court, in Pacific Employers Ins. Co. v. IAC (Snell), 219 Cal.App.2d 634, 33 Cal.Rptr. 442 (1963), rejected a claim that a 1959 amendment to Labor Code §5500.5[8] was an unconstitutional

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8 Labor Code §5500.5 as enacted in 1951 provided that if an employer or insurer were insolvent, payment of any amount attributed to that portion of liability would be from the Subsequent Injuries Fund. The 1959 amendment deleted this

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violation of due process, stating:

> "The Legislature, apparently accepting this argument, withdrew the use of the Fund for reimbursement. Whether or not this was an act of sound legislative policy is not for us to say. Our inquiry can go no further than to determine whether section 5500.5, after removal of the public reimbursement feature, was within or exceeded the limits of the police power. [6] We make this determination guided by the restraining principle that a 'legislative act is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.' (Citation omitted.) [1c] We face recognition that workmen's welfare was high priority in public interest, that

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provision leaving the remaining solvent employers or insurers liable. The Attorney General reported to the Legislature in 1959 that the 1951 version of Labor Code §5500.5 imposed a financial burden on the taxpayers which properly should be borne by the insurance industry. (Report to Legislature Pursuant to Labor Code §4753 by Stanley Mosk, Attorney General, January 1959, p. 24.) The report concluded that "Section 5500.5 has been and will be used almost exclusively by insurance companies to reimburse them for a liability which resulted from an insurance contract executed prior to the enactment of Section 5500.5" (Id., at pp. 30 & 31.) The Attorney General's statement clearly implies that contracts of workers' compensation insurance incorporate subsequent legislative enactments.

> occupational diseases and particularly silicosis with its insidious progression to disability, are matters of grave concern in this field.
>
> "The problem with which the Legislature was concerned here has no perfect solution. It is a situation where the entity properly chargeable cannot be reached. Either the injured employee must go uncompensated or someone else must 'pick up the tab' -- either the public, the industry as a whole, or those solvent members of it who participated in causing the disability. The Legislature has selected the last alternative. We believe it acted reasonably ....
>
> "Tested by the foregoing principles we cannot say that the plan of the section as amended in 1959, whereby any selected employer or employers contributing to the disability of the silicosis victim must bear the burden of the entire award with only the limited right of reimbursement retained and without recourse to public funds to effect complete reimbursement, is not a valid exercise of the police power -- and we so hold. (219 Cal.App.2d 634, 643-644.)

Although §5500.5 originally referred only to occupational disease, the court interpreted that language as including cumulative traumas. (See Freuhauf Corp. v.

Workmen's Compensation Appeals Board, 68 Cal.2d 569, 576; 68 Cal.Rptr. 164, 168 (1968). The proliferation of occupational disease and cumulative trauma cases consistent with new medical theories created a procedural nightmare for the Workers' Compensation Appeals Board. Because of the multiple carriers and employers involved in litigation of a cumulative trauma or occupational disease claim, inordinate delays and excessive cost were obstructing the constitutional mandate to accomplish substantial justice expeditiously, inexpensively and without encumbrance of any character. These cases became a major calendaring problem throughout the state affecting the claims of other employees because their cases could not be handled expeditiously. Tremendous resources of the Board had to be expended in processing

multiple party claims.[9]

Reacting to this situation, the Legislature, in 1973, amended Labor Code §5500.5 to ameliorate these problems by limiting liability for occupational disease or cumulative injury to those who had employed the worker during the five years immediately preceding the injury or last date of hazardous employment, subject to an exception commonly

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9 See Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 55-56, 353. See Harrison, et al. v. Peninsula Steel Co., et al., 39 Calif. Compensation Cases 326 (1974), the Appeals Board's en banc decision affirmed by the California Court of Appeal in Harrison, infra, for a detailed discussion of burdens and problems for the WCAB resulting from pre-1973 legislation.

known as the "single employer rule."[10]

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10 Labor Code §5500.5, as amended in 1973, provided:

"§5500.5(a) Liability for occupational disease or cumulative injury shall be limited to those employers who employed the employee during a period of five years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior years except as provided in subdivision (d); however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

"(b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If such request is made prior

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to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together with a notice of the time and place of hearing to be served upon such omitted employer; provided, such notice can be given within the time specified in this division. If such notice cannot be timely given or if the motion for joinder is made at the time of the first hearing, then the appeals board or referee before whom the hearing is held, if it is found that the omitted employer named is a necessary or proper party, may order a joinder of such party and continue the hearing so that proper notice may be given to the party or parties so joined. Only one continuance shall be allowed for the purpose of joining additional parties. Subsequent to the first hearing the appeals board shall join as a party defendant any additional employer when it appears that such employer is a proper party, but the liability of such employer shall not be determined until supplemental proceedings are instituted.

"(c) In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the five-year period set forth in subdivision (a), the employee making the claim, or his dependents, may elect to proceed against any one or more of such employers. Where such an election is made, the employee must successfully prove his claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his dependents has made an election to proceed against one or more employers, it should appear that there is another

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proper party not yet joined, such additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of such employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board's final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his dependents such information as will as enable the employer to determine the time, place, and duration of the alleged employment. On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.

"(d) If the employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury was for more than five years with the same employer, or its predecessors in interest, the limitation of liability to the last five years of employment as set forth in subdivision (a) shall be inapplicable. Liability in such circumstances shall extend to all insurors [sic] who insure the workmen's compensation liability of such employer, during the entire period of the employee's exposure with such employer, or its predecessors in interest. The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage. As used in this subdivision, 'insurer' includes an employer who during any period of the employee's exposure was self-insured or legally uninsured.

"The provisions of this subdivision shall expire on July 1, 1986, unless otherwise extended by the Legislature prior to that date.

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"(e) At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under such award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. Such a proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his dependents, but shall be limited to a determination of the respective contribution rights, interests or liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss such employer and amend its original award in such manner as may be required.

"(f) In any proceeding before the appeals board for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:

"(1) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in such operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his estate or dependents as the result of disability or death resulting from or aggravated by such exposure.

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"(2) In making its determination in the supplemental proceeding for the purpose of determining an apportionment of liability or of a right of contribution of percentage liabilities of the various employers engaged in underground metal mining operations the appeals board shall consider as a rebuttable presumption that employment in underground work in any mine for a continuous period of more than three calendar months will result in a silicotic exposure for the employee so employed during the period of employment if the underground metal mine was driven or sunk in rock having a composition which will result in dissemination of silica or silicotic dust particles when drilled, blasted or transported.

"(g) Any employer shall be entitled to rebut such presumption by showing to the satisfaction of the appeals board, or its referee, that the mining methods used by the employer in the employee's place of employment did not result during his employment in the creation of silica dust in sufficient amount or concentration to constitute a silicotic hazard. Dust counts, competently made, at such intervals and in such locations as meet the requirements of the Division of Industrial Safety for safe working conditions may be received as evidence of the amount and concentration of silica dust in the workings where such counts have been made at the time when they were made. The appeals board may from time to time, as its experience may indicate proper, promulgate orders as to the frequency with which such dust counts shall be taken in different types of workings in order to justify their acceptance as evidence of the existence or nonexistence of a silicotic hazard in the property where they have been taken.

"(h) The amendments to this section adopted at the 1959 Regular Session of the Legislature shall operate retroactively, and shall apply retrospectively to any cases pending before the

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That exception was in subdivision (d) of §5500.5 as enacted in 1973 and provided in essence that where the employment of the injured worker was more than five years with the same employer, or its predecessors in interest, the five-year limitation of liability would be inapplicable in that liability in such circumstances would extend to all insurers who insured the workers' compensation liability of such employer during the entire period of the employee's exposure with that employer, or its predecessors in interest. The Legislature expressly

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appeals board or courts. From and after the date this section becomes effective no payment shall be made out of the fund used for payment of the additional compensation provided for in Section 4751 of this code, or out of any other state funds, in satisfaction of any liability heretofore incurred or hereafter incurred, except awards which have become final without regard to the continuing jurisdiction of the appeals board on said effective date, and the state and its funds shall be without liability therefor. This paragraph shall not in any way effect a reduction in any benefit conferred or which may be conferred upon any injured employee or his dependents."

provided that this exception would expire on July 1, 1986 unless otherwise extended by the Legislature prior to that date.

In Harrison v. Workers' Compensation Appeals Board, 44 Cal.App.3d 197; 118 Cal. Rptr. 508 (1974), the Court upheld the application of the 1973 amendment to injuries occurring before its effective date. The Court noted that the 1973 amendment brought California more in line with most workers' compensation systems in other jurisdictions[11] and concluded that in light of the

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11 See 4 Larson, Law of Workmen's Compensation §95.21 to 95.25, pp. 17-79 to 17-95; Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 397-402. For decisional application of the last employer doctrine, see Cordero, et al. v. Triple A Machine Shop, et al., 580 F.2d 1331, 9th Circ. (1978), cert. denied, 440 U.S. 911, 99 S.Ct. 1223 (1979). Travelers Ins. Co., et al. v. Cardillo, 225 F.2d 137, 145 (CA2 1955), cert. denied, 350 U.S. 913, 76 S.Ct. 196.

legislative history of the section and the serious procedural problems presented by the Appeals Board,[12] it did not find it difficult to ascertain and identify the

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12 The Court noted in Harrison that, under the pre-1973 Labor Code §5500.5, proceedings were encumbered by numbers of attorneys representing numerous carriers and employers, each of whom had a right to appear and cross-examine the applicant and other witnesses. The "single employer exception" after 1973 until the 1977 amendment to Labor Code §5500.5 still contributed to this problem. Many single private employers have numerous insurance companies over the years with varying periods of coverage necessitating appearances by multiple attorneys in Board proceedings either at the initial hearing or at contribution hearings. Even in a case like the present one, both the City and the carrier may seek their own medical-legal evidence, present their own witnesses, cross-examine the injured worker, not only to defeat or limit the other worker's claim, but to shift the liability for benefits between each other. (See Cal. Assem. Comm. on Finance & Commerce, Interim Hearings (Jan. 12 & 19), pp. 188-189.) Tidewater Oil Co. v. WCAB, 67 Cal.App.3d 950, 137 Cal. Rptr. 36 (1977) is another example of litigation under the single employer exception which deprives injured workers of expeditious hearings while the alleged employers litigate "prececessor in interest."

intent of the Legislature, charged as it was with a constitutional duty to provide a workers' compensation system which "shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character ...." (Citation omitted.) In 1977, §5500.5 was amended to reduce the five-year period to a one-year period by 1981, as well as to eliminate the time limited single employer exception.[13] In 1979, the California

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13 Labor Code §5500.5(a) as amended in 1977 provided in pertinent part:

"[L]iability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury ... or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease

(continued on next page)

Supreme Court, in Flesher v. WCAB, et al., 23 Cal.3d 322, 152 Cal.Rptr. 459 (1979), set forth the history of §5500.5 and indicated with reference to the 1973 and 1977 amendments:

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or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or asserted on or after	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year"

* * *

"If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining such liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment."

See footnote 10 for repealed §5500.5(d).

> "The purpose of these amendments was to provide greater certainty to insurers in anticipating cost and necessary reserves, to simplify the proceedings by reducing the number of employers and insurers required to be joined as defendants, and to reduce the burden placed on the entire system by the former procedures ...."
> 23 Cal.3d at 328; 152 Cal.Rptr. at 463.

The 1977 amendment was directed at the workers' compensation system as a whole; employers, insurance carriers, self-insured employers were all affected by this legislation. The creation of greater certainty in predicting future liability inures to the benefit of insured and uninsured employers alike.[14] The imposition of

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14 This legislation was widely supported in spite of the effect on all segments of the workers' compensation community, although some public entities did oppose it. The insurance industry did stand to benefit from greater certainty in predicting risks. However, this Court has held: "Legislation [cannot] be set aside by the courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it." Cohen v. Beneficial Industrial Law Corp., 337 U.S. 541, 550, 551; 69 S.Ct. 1221, 1228 (1949). Over a

liability upon current employers and carriers motivate those best able to correct hazardous or unsafe conditions to do so, thus providing safe places of employment pursuant to the constitutional mandate and, at the same time, reducing the cost

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period of years the costs for self-insured employers will even out because self-insured employers will not be liable for employers who have left and gone to work for other employers for the limited periods of employment provided in Labor Code §5500.5 as amended in 1977. In addition, self-insured employers are faced with the same problems as insurance carriers in ability to measure and provide for future cumulative injury liability. See Proceedings of Cal. Assem. Comm. on Finance, Insurance & Commerce, Appendix, p. 367.

In Cordero v. Triple A Machine Shop, supra, at 1336, the Court noted the underlying rationale of the last employer doctrine is that all employers will be last employers a proportionate share of the time. In accord, Flesher, supra, at p. 328, "The insurance industry favored these amendments and reasoned that total burdens and benefits upon employers and insurers would more or less even out for, while they might be required to assume a larger liability in some cases, they would be absolved of liability in other cases." (Citation omitted.)

of workers' compensation benefits. The elimination of procedural morass and delay at Board proceedings also served to eliminate unnecessary litigation costs complying with the constitutional mandate to accomplish substantial justice both expeditiously and inexpensively.

THE CITY OF TORRANCE'S CONTRACT OF INSURANCE WITH STATE COMPENSATION INSURANCE FUND WAS NOT IMPAIRED BY THE 1977 AMENDMENT TO LABOR CODE SECTION 5500.5

The Supreme Court of the State of California considered the City's contention "that it paid the State Fund valuable consideration in the form of insurance premiums." In return, the State Fund allegedly promised to pay benefits for that portion of any cumulative injury attributable to the period during which coverage was provided to the City (Juris. State. App., p. 11) and the further contention that "the repeal of the 'single employer exception'

operated to release to a substantial degree the State Fund from this obligation." (Ibid.) The Court analyzed the pertinent provisions of the insurance contract indicating that "It is apparent that the City's characterization of the State Fund's obligation is not accurate." The Court pointed to those references in the contract to workers' compensation laws which appellant has deleted from its Jurisdictional Statement and concluded that the only obligation the State Fund assumed was the obligation to pay what the workers' compensation law required. The Court noted the language of the contract and the concession of the City at oral argument that it was the parties' intention to incorporate subsequent changes in law into their insurance agreements. (See Appendix, infra, p. 1, for a more accurate and detailed transcription of that portion of

oral argument referred to by the California Supreme Court in its opinion.) In view of the City's concession that the insurance contract contemplates "all kinds of amendments" to workers' compensation laws, its contention that the 1977 amendment to Labor Code §5500.5 impairs its obligation of contract is illogical, if not frivolous.

In cases involving the validity of a state statute where it is alleged that the statute impaired the obligation of a contract, the U. S. Supreme Court may independently evaluate the nature and extent of the obligation of contract. (Irving Trust Co. v. Day, 314 U.S. 556, 62 S.Ct. 398 (1942).) The Court will, however, attach a great weight to the views of the highest court of the state as to the existence and nature of the alleged contract. Higginbotham v. Baton Rouge, 306 U.S. 535,

59 S.Ct. 705, rehearing denied, 307 U.S. 649, 59 S.Ct. 831 (1939); Dodge v. Board of Education, 302 U.S. 74, 58 S.Ct. 98 (1937).[15]

In United States Mortgage Co. v. Matthews, 293 U.S. 232, 55 S.Ct. 168 (1934), this Court considered a 1925 mortgage instrument that provided that the mortgagor consented to sale of the mortgaged property in accordance with an 1898 statute or any amendment thereto. This Court overruled a state court holding that the mortgage contract meant to include only statutory amendments up to 1925, the date of making, and that the application of a 1933 statute would be an impairment of contract rights.

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15 A lower court's decision is to be given most respectful consideration and followed unless it seems to be plainly erroneous. Millsap College v. City of Jackson; 275 U.S. 129, 132, 48 S.Ct. 94, 95 (1927).

This Court found that the challenged act could not properly be said to impair the obligation of contract between the parties within the meaning of the federal constitution stating that a contrary holding would deprive "the words of the contract of their customary meaning."

In an early case on adopting an approach of affirming on a motion to dismiss, this Court indicated that the state court ruling "was so obviously correct that we did not feel constrained to retain the case for further argument." Richardson v. Louisville N.R.R., 169 U.S. 128, 132, 18 S.Ct. 268 (1898). Subsequent decisions of this Court have indicated that dismissal is appropriate if the questions presented are frivolous, while affirmance is appropriate if the questions are so far wanting in

substance as not to require argument beyond the appeal papers and opposing motions.[16] Appellee would contend that this Court, on the record before it, may either dismiss the appeal on the ground of the frivolity of the City's assertions in light of its contractual agreement or upon the ground "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument." (Supreme Court Rule 16.1(c).) Further, since the finding by the State Supreme Court that there is no impairment of contract is so obviously correct, there is left no substantial federal question for the Court

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16 Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459, 59 S.Ct. 622 (1939); Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435 (1923). For general discussion, see Wright & Miller, Federal Practice & Procedure, §4014, pp. 631-639.

to consider.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION BEFORE THE COURT

The Court of Appeal of the State of California analyzed the effect of change of law on the policy of insurance between the State Fund and the City as follows:

> "In carrying out its constitutional mandate to provide a system of workers' compensation insurance which makes 'adequate provisions for the comfort, health and safety and general welfare' of workers and their dependents [sic], the Legislature needs to modify the system from time to time. The evolution of social and economic conditions and the teaching of experience impel continual reexamination of the compensation system.
>
> "As changes in substantive and procedural law occur, whether by legislative enactment or judicial interpretation, some impact upon the insurer's risk is inevitable. A few examples will illustrate this truism.
>
> "The Legislature has from time to time changed the rate of compensation for disability; and it has long been recognized that the measure of compensation is governed by the law in force at the time the employee sustains an industrially caused

disability. Thus in Argonaut Mining Co. v. Ind. Acc. Com., 104 Cal.App.2d 27 (1951), a disability occurring in 1948 as a result of exposure to silica hazards between 1923 and 1928 was held compensable under the statutes in effect in 1948. The employer contended that this result violated the contract impairment clauses of the California and federal Constitutions, arguing that the statutes in existence at the time of employment were a part of the contract of employment. The Court of Appeal rejected that argument, pointing out that the employer's duty to pay compensation was not contractual but statutory; and that the applicable rate was that which the law provided at the time the right to compensation came into existence. The court said at page 31: 'Regardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability. It would seem that the law then in effect should govern the claimant's rights.'

"In State of California v. Industrial Accident Commission, 175 Cal.App.2d 674 (1959), the employer and its compensation carrier were awarded partial indemnification from the California Subsequent Injuries Fund under a provision of Labor Code Section 5500.5 which was then in force. While the state's proceeding to review that award was pending in the Court of Appeal, legislation deleting that

provision of section 5500.5 went into effect, together with a legislative declaration that the deletion should apply retrospectively to any cases pending before the Commission or the courts. Accordingly, the Court of Appeal ordered the Commission to annul the indemnification award.

"The development of the law with respect to progressive occupational disease and cumulative trauma itself illustrates the impact of changes in the law upon the risks to which compensation insurers and self-insurers have been exposed." (Juris. State. App., pp. 33-35.)

After discussing various decisions of the California appellate courts, the Court of Appeal concluded:

"Although the relationship between the employer and the compensation insurer is contractual in origin, the scope of the insurer's liability is established by law. In particular, the terms and conditions of compensation payable to the injured worker or his survivors are as determined by the Legislature and are subject to change by legislative action.

"In the operation of this compensation system, the time when the employee was exposed to hazard does not necessarily determine which employer or insurer will be liable for the payments required by statute. Nor does the law

> in effect at the time of the employee's exposure necessarily determine the amount payable. Development of the law relating to compensation for occupational disease and cumulative trauma has from time to time imposed upon insurers and self-insurers liabilities of a kind and magnitude not known when the obligation was undertaken. Those liabilities were incurred because the insurers and self-insurers were obligated to pay what the law required as compensation and medical care for the disabled employee. The possibility of changes in the applicable law has become a part of the risk assumed by the compensation carriers and the self-insurers." (Emphasis added) (Juris. State. App., pp. 36-37.)

Pursuant to constitutional mandates of "full provision for adequate insurance coverage against liability to pay or furnish compensation" and full provision for regulating such insurance coverage and for otherwise securing the payment of compensation all, as part of a complete system of workers' compensation (See Art. XIV, §4, supra, p. 11), the California Legislature has heavily regulated for all employers the option of self-insuring and the

provision of insurance coverage under the workers' compensation laws of the State of California.[17] Although the general laws of insurance contracts apply to California workers' compensation insurance policies, the content of such policies is governed in important particulars by statute[18] and must be approved as to substance and form by the Insurance Commissioner after consultation with the Workers' Compensation Appeals Board.[19]

Although the insurance contract between the insurer and the employer is private, the public nature of workers' compensation law in the State of California

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17 See Labor Code §§3700-3760; Insurance Code §§11650 thru 11660.

18 Ibid. See in particular §11654 which requires insurers to be bound by orders, findings, decisions or awards rendered against an employer "under the provisions of the law imposing liability for compensation...."

19 Calif. Ins. Code §11659.

is extremely pertinent to the constitutional question raised by appellant. This Court has consistently upheld the exercise of the police power as the principle constitutional basis for the enactment of workers' compensation legislation. The majority of cases hold that workers' compensation laws come under the police power of the states because they lessen the probability that an injured worker will become a public charge, maintain the economic welfare of people and promote the State's interest in the security of those under the protection of its laws.[20] In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, rehearing denied, 439 U.S. 886, 99 S.Ct. 233 (1978), this Court held:

> "First of all, it is to be accepted as a commonplace that the Contract

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20 Madera Sugar Pine Co. v. IAC, 262 U.S. 499, 43 S.Ct. 604 (1923).

> Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statues impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." Manigault v. Springs, 199 US 473, 50 L.Ed. 274, 26 S.Ct. 27. As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in Hudson Water Co. v. McCarter, 209 US 349, 357, 52 L.Ed. 828, 28 S.Ct. 529: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract." 438 U.S. at 242, 98 S.Ct., at 2721.

As the Supreme Court of the State of California has indicated, a finding that the State, in exercise of its police power, has abridged an existing contractual relationship does not in and of itself establish

a violation of the contract clause. The court below, however, found no such abridgement making it unnecessary to move to the second inquiry as to whether or not an impairment exceeded constitutional bounds.

Appellant has incorrectly applied the criteria set forth in Home Building & Loan Association v. Blaisdell, 209 U.S. 398, 54 S.Ct. 231 (1934), to this case. In Allied Structural Steel Co., supra, this Court held that a Minnesota law impaired the obligation of contract because the law did not deal with a broad generalized economic or social problem, did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, did not affect simply a temporary alteration of contractual relationships and had a narrow aim. (438 U.S. at 250;

98 S.Ct., at 2725.)

In Energy Reserves Group, Inc. v. The Kansas Power and Light Co., 51 U.S.L.W. 4105 (1983), Justice Blackman set forth the applicable law on the question of whether or not a state law in fact operated at the substantial impairment of a contractual relationship as follows:

> "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' Allied Structural Steel Co., 438 U.S., at 244. See United States Trust Co., 431 U.S., at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Allied Structural Steel Co., 438 U.S., at 245. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. United States Trust Co., 431 U.S., at 26-27. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id., at 31, citing El Paso v. Simmons, 379 U.S. 497, 515 (1965). In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. Allied

Structural Steel Co., 438 U.S., at 242, n. 13, citing Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32, 38 (1940) ('When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.'). The Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. United States Trust Co., 431 U.S., at 22, such as the remedying of a broad and general social or economic problem. Allied Structural Steel Co., 438 U.S., at 247, 249. Furthermore, since Blaisdell, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. United States Trust Co., 431 U.S., at 22, n. 19; Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S., at 39-40. One legitimate state interest is the elimination of unforeseen windfall profits. United States Trust Co., 431 U.S., at 31, n. 30. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.

"Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' United States Trust Co., 431 U.S., at 22. Unless the State itself is a contracting party, see id., at 23, '[a]s is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Id., at 22-23."[21]

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21 In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), this Court held that while the Due Process Clause placed greater limitations on the Government power to legislate retrospectively rather than prospectively, Congress had broad discretion to deal with the serious social problem of pneumoconiosis affecting former miners and the federal statute, requiring operators of coal mines to compensate employees who had contracted pneumoconiosis even though the employees had contracted pneumoconiosis before the act was passed, was a rational measure to spread the costs of the employee's disability to those who have profited from the fruits of their labor -- the operators and the consumers." 428 U.S., at 18, 96 S.Ct., at 2893.

In Todd Shipyards Corp., et al. v. Edith Witthuhn, et al., 596 F.2d 899 (1979), the Court held an amended provision of the

(continued on next page)

Longshoremen and Harbor Workers' Compensation Act to be applicable to claims based upon death occurring after the amendment's effective date even though the disabling injury occurred before that date. The Court not only rejected the constitutional challenge to retrospective application of the amendment, but considered the contention that the statute violated Art. I, §10 of the U. S. Constitution stating: "Moreover, even if the Contract Clause were incorporated into the Fifth Amendment due process by analogy to Bolling v. Sharp, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), that would not help petitioners. Their expectations that the government would not require Todd to pay death benefits did not give rise to vested rights which could not be modified retroactively." The Court cited Allied, supra, p. 38, for the proposition that the parties cannot remove the power of the state to regulate rights by making a contract about them and indicated immunity from Federal Regulation could not be gained by "forehanded contracts." Id., at 904. In this case, the Appeals Board stated: "Even if defendant City had a right to contribution from petitioner by reason of the previous subsection (d), such right was not of common law origin and was not vested but inchoate. When subsection (d) was not included in the amendment effective January 1, 1978, defendant lost its right to contribution, thereon based, for any matter where the claim was filed after such effective date. (cf. Subsequent Injuries Fund v. IAC (Koski).) (Juris. State. App., p. 43.) [Official citation: 175 Cal.App.2d 674, 346 P.2d 861 (1959)].

There is no doubt in the present case that the insurance contract itself refers to subject matter of workers' compensation which has been heavily regulated and subjected to legislative change ever since the inception of the Workers' Compensation Act in the early 1900's. The contract, in fact, incorporates those laws that have been amended and continue to be amended. The appellant would have the court believe that Labor Code §5500.5, as amended in 1977, did not address a broad social problem but merely focused on so-called "single employers." This ignores the fact that the elimination of the single employer exception was only a small part of the 1977 amendments to Labor Code §5500.5. As indicated above, the purpose of both the 1973 and 1977 amendments was to carry out the constitutional mandates by providing greater certainty to insurers and employers

in anticipating cost and necessary reserves, simplifying procedure and reducing the burdens placed on the entire system by former procedures.

In 1973, the Legislature enacted the single employer exception as a temporary measure. Since single employers under the 1973 amendment as well as insurers would share in the benefits of the 1977 amendments to Labor Code §5500.5, there was neither a substantial nor a severe permanent change in any previous contractual relationship. In any event, changes in workers' compensation laws were part of the risk all employers assumed whether under specific provision of these insurance contracts or in their self-insured status.

Appellant has simply failed in its burden to show this Court any substantial impairment of its insurance contract with State Fund. Cumulative trauma and

occupational disease claims are but a portion of claims for which coverage is provided individual employers. More important is the totality of these kinds of claims throughout the work community and the significant burden on the litigation system. The shift of $52,700,000 of liability in a workers' compensation system where over $800,000,000[22] worth of benefits were paid by insurance companies each year was relatively insignificant when the Legislature was confronted with facts supporting the proposition that workers' compensation would almost inevitably become uninsurable in California unless a method of determining an

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22 Paid workers' compensation losses for the insurance industry in 1977 were $853,000,000. Direct losses incurred (paid losses plus reserves) were $1,237,000,000. Underwriters Report, 1977, Annual Statistical Review (May 25, 1978), p. 51.

employer's liability could be calculated on an actuarially sound basis.[23]

Petitioner has failed to demonstrate that the provision of greater certainty in anticipating costs and predicting liability in cumulative trauma and occupational disease cases, the reduction of litigation costs and expedited legal proceedings and the reduction of workers' compensation claims because of the elimination of hazardous or unsafe conditions, all significant and reasonable purposes of the 1973 and 1977 amendments to Labor Code §5500.5 designed to remedy an ailing workers' compensation system, in any way substantially impaired the petitioner's insurance contract with the State Fund.

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23 Calif. Assem. Comm. on Finance, Insurance and Commerce, Interim Hearings (Jan. 12 & 16), pp. 177-199.

CONCLUSION

For the foregoing reasons, appellee respectfully submits this appeal fails to raise a substantial federal question and should accordingly be dismissed.

Dated: April 12, 1983

WORKERS' COMPENSATION APPEALS BOARD

By Richard W. Younkin
RICHARD W. YOUNKIN
Secretary & Deputy Commissioner

APPENDIX

DECLARATION OF RICHARD W. YOUNKIN

I, RICHARD W. YOUNKIN, being deposed under penalty of perjury, do certify and say:

1. I am an attorney licensed to practice before all the courts of the State of California. I represented respondent, Workers' Compensation Appeals Board of the State of California, at the oral argument before the California Supreme Court in this case which is presently on appeal to this Court.

2. Petitioner's counsel, David E. Lister, in the Appendix to the Jurisdictional Statement included his Declaration stating: "All of the court's questions and my responses are set forth haec verba in connection with the issue whether the City had agreed to accept changes in the

terms of its agreement with State Fund." (Juris. State. App., p. 61.)

3. Fearing distortions and deletions similar to those petitioner's counsel made in presenting pertinent provision of the insurance contract (See Motion to Dismiss or Affirm, supra, pp. 10-11) and because the California Supreme Court in its Opinion referred to critical concessions made by petitioner's counsel, Mr. Lister, at the time of oral argument before that Court, I requested permission and arrangements were made with the Clerk of the Court to listen to the tape recording of the oral argument on March 24, 1983, At that time, I and my secretary, Annette L. Gabrielli, were permitted to listen to the tape and stop the tape and copy such portions of the oral argument as we deemed necessary. The following questions by the Court and answers by Mr. Lister were all of those

which related to the question of whether the insurance contract with State Fund incorporated subsequent changes in workers' compensation laws:

JUSTICE REYNOSO:

"But Counsel, the contract says -- and correct me if I am wrong -- says that the insurer does hereby agree to pay promptly and directly to any person entitled thereto under the workers' compensation laws of the State of California, period. That's as far as the contract goes.

"Is my understanding correct or incorrect?"

MR. LISTER:

"That's basically correct, Your Honor."

JUSTICE REYNOSO:

"Okay. Now, that's all the contract says. I take it there was no impairment of that contract or, put it differently, if you wanted to protect yourself in terms of the status quo, why was nothing more added other than to simply agree contractually that the carrier would pay pursuant to the laws of the State of California?"

MR. LISTER:

"Well, as you undoubtedly are aware, Justice Reynoso, the insurance contracts are contracts of adhesion. They are not something the terms of which is in general required by statute, and that is what is an insurance contract if you wish to be insured by the State Fund -- that is the sort of policy language that you accept. You don't have the power -- even the City of Torrance -- doesn't have the power to bargain over the terms and conditions of the language of the policy."

JUSTICE REYNOSO:

"So what was the obligation that was impaired?"

MR. LISTER:

"The obligation that was impaired was the obligation of the State Compensation Insurance Fund to pay the benefits which had been incurred during the injurious exposure suffered by Mr. Atkinson during the time that he was employed by the City of Torrance when the City was insured by the State Fund. It's clear that the State Fund would have had that obligation prior to the 1977 legislation and it's clear that the 1977 legislation eliminated that contractual obligation."

JUSTICE NEWMAN:

"But what does the phrase mean 'under the workmen's compensation laws of the State of California and as therein provided'? Are you saying that that doesn't contemplate amendment?"

MR. LISTER:

"Oh, no. It certainly does contemplate amendment. It contemplates all kinds of amendments, increases in rates, increases in the kinds of injuries that are found compensable, all sorts of things. What we are urging today is not that the Legislature is constrained and cannot increase rates. It clearly can and without impairing any kind of a contract. It will simply result in higher premiums paid by insured employers and in higher payments by currently self-insured employers. All we're saying is that the law of the State of California cannot tamper with and abrogate the rights of parties to private contracts --"

JUSTICE NEWMAN:

"Even though those rights are the rights as provided in the statute to be amended."

MR. LISTER:

"That's correct. But the duty of the insurance company to its insured to indemnify the insured for injuries which occurred during the insured's period of coverage exists despite amendments in other aspects of the ...."

JUSTICE NEWMAN:

"What words of the contract lead you to that conclusion?"

MR. LISTER:

"That's simply our view of what the contract clause of both the United States and Federal Constitutions require."

JUSTICE NEWMAN:

"And, incidentally, you said both the United States and the Federal."

MR. LISTER:

"I'm sorry. The United States and California."

JUSTICE NEWMAN:

"Are you sure the California Constitution applies?"

MR. LISTER:

"I believe it does, Your Honor."

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of April, 1983, at San Francisco, California.

RICHARD W. YOUNKIN

No. 82-1436

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CITY OF TORRANCE,
Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA;
STATE COMPENSATION INSURANCE FUND,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OF AFFIRM

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QUESTIONS PRESENTED

I

May the Legislature, pursuant to the plenary power granted it by the California Constitution to enact a complete system of workers' compensation, limit the period of liability in a cumulative injury case?

II

Is a workers' compensation insurance agreement impaired by a legislative enactment where the insuring agreement provides that the parties will be bound by the workers' compensation law of the State of California?

PARTIES TO THE PROCEEDING

The State Compensation Insurance Fund is one of the parties in the court below.

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No. 82-1436

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CITY OF TORRANCE,
Appellant,

VS.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA;
STATE COMPENSATION INSURANCE FUND,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OF AFFIRM

STATEMENT OF FACTS

A. The State Statute Involved and the Nature of the Case

This action arises out of a workers' compensation claim and involves the issue of liability for an injury that occurred during City of Torrance's, appellant, period of self-insurance. The injured workers' benefits are not involved. At issue is whether the California Legislature can limit the period of liability in a cumulative trauma case and hold only those employers responsible who were on the risk during the last four years of hazardous exposure. The statute involved is Labor Code Section 5500.5, which provides under subsection (a):[1]

> "(a) Except as otherwise provided in Section 5500.6 which applies to household employees, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

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[1]Section 5500.5 is a comprehensive code section that deals with cumulative trauma and occupational disease injuries. It contains sub-sections (a) through (i) and provides a detailed format, including procedures for litigation. The sections identify the method of joinder of additional parties, subsequent procedures for contribution, apportionment and the period of accountable liability. Appellant's challenge is limited to the latter section, subsection (a).

For claims filed or asserted on or after:	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

If, based upon all the evidence presented, the appeals board or referee finds the existence of cumulative injury or occupational disease, liability for such cumulative injury or occupational disease shall not be apportioned to prior or subsequent years. . . ."

B. The California Workers' Compensation System

1. The Legislature established a competitive workers' compensation system

Article XIV, Section 4 (formerly Article XX, Section 21) of the California Constitution provides that the Legislature is "vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation . . ." The Article states that the Legislature is vested with the same power to provide "for full provision for adequate insurance coverage to pay or furnish compensation . . . and for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund." The Article also empowers the Legislature to establish an administrative system to litigate workers' compensation cases to accomplish "substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character."[2]

In providing for a complete system of workers' compensation, the Legislature established a competitive, nonmonopolistic workers' compensation program, one which allows employers to seek workers' compensation coverage from the State Compensation Insurance Fund or other

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[2]Amendment adopted November 5, 1918.

carriers.[3] There are over 100 workers' compensation carriers competing with one another in California.

Public agencies are slightly restricted. They must purchase workers' compensation insurance from the State Compensation Insurance Fund or elect to become self-insured.[4] If public agencies become self-insured, they may contract with private carriers to administer and defend their claims. Public agencies are not bound to purchase other forms of insurance from the State Compensation Insurance Fund and may freely contract with other carriers for liability, automobile and fire insurance as well as other coverages. It is clear that appellant's brief exaggerates the role of the State Compensation Insurance Fund and its relation to public agencies. Furthermore, it is incorrect to state that California has established a "state monopoly for selling insurance to public agencies." App. Br. 1. There simply is no authority for the proposition that public agencies must buy *all* of their insurance from the State Compensation Insurance Fund or that they even have to be insured with appellee.

2. The State was not a party to the contracts at issue

It is incorrect to state that "the State of California (was) a party to the contracts at issue." App. Br. 13. Appellee's operating funds are separate and distinct from the State of California and its posture in this case is no different from that of any other insurance carrier.[5]

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[3]Labor Code Section 3211; 2 Larson, Workmen's Compensation Law Appendix A, Table 7; 2 Hanna, California Law of Employee Injuries and Workmen's Compensation (2d ed. 1979) (Section 1.05 [6] [c]).

[4]Insurance Code Section 11870, Labor Code Section 3700(c), 3702 et seq.

[5]The State Compensation Insurance Fund was established pursuant to the Boynton Act, Section 11770, Stats. 1913, Ch. 176 to provide immediate protection to California employers and employees, since there were no workers' compensation insurance carriers in existence when workers' compensation was introduced.

Appellee is a self-supporting insurance carrier that is financially distinct from the State of California and does not depend on general revenues from the State for any of its operations.[6] Appellee functions like a mutual insurance company, returning profits to its insureds in the form of dividends.[7] "The State Compensation Insurance Fund has compiled a long and imposing record of substantial dividend payments."[8]

In an attempt to show an economic dependence between the appellee and the State, appellant cites California Insurance Code Section 11773. App. Br. 5, fn. 3. This section provided the basis for an appropriation of one hundred thousand dollars "seed-money" to the appellee in 1913. No part of the appropriation was ever drawn from the State treasury and the whole sum was repaid with interest in 1921.[9] Even more significant is the fact that this section was repealed in 1979 and now reads, "The fund shall be organized as a public enterprise fund."[10]

Appellee is not only mandated to be "fairly competitive" with other workers' compensation carriers, but special legislative enactments distinguish appellee from state agencies and put it on an equal footing with all other compensation carriers.[11] Appellee is authorized to transact workers' com-

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[6]Insurance Code Section 11772; *Burum v. State Compensation Insurance Fund*, 30 Cal.2d 575 (1947); *Gilmore v. State Compensation Insurance Fund*, 23 Cal.App.2d 235 (1937); 2 Hanna, op. cit. supra (Section 20.01 [B]); Herlick, California Workers' Compensation Law Handbook, Second Edition, Volue 1, (Section 1.20).

[7]Insurance Code Section 11776.

[8]2 Hanna, op. cit. supra, (Section 1.05 [6] [c], fn. 18).

[9]2 Hanna, op. cit. supra, (Section 2.04 [2], fn. 4).

[10]Stats. 1982, Ch. 714, Section 305.

[11]Insurance Code Sections 1175, 11781; 2 Hanna, op. cit. supra, Section 20.01 [1] [b].

pensation insurance "to the same extent as any other insurer."[12] Appellee's assets provide the basis for its operation, i.e. payment of losses, expenses and dividends.[13] "The State is not liable beyond the assets of the State Compensation Insurance Fund for any obligation in connection therewith."[14] State taxes are paid through a premium tax, calculated on the same basis as with all other California workers' compensation insurers.[15] Appellee is allowed to invest its funds in the same manner as private carriers and is not bound by rules pertaining to state agencies.[16] Appellee is expressly exempted from California Government Code sections that apply to state agencies that deal with the expenditure of funds.[17] Appellee's real property is subject to taxation on the same basis as other private insurance carriers, on the rational that its property is not regarded as State property for purposes of taxation.[18] Finally, appellee is not subject to those provisions of the Government Code applicable to State agencies generally or collectively, except as to State Personnel Board rules governing employer-employee relations.[19]

In brief, appellee's financial status and insurance operations are separate and distinct from the State of California. Even in the event of insolvency, no State funds would be appropriated; as a member of the California Insurance Guarantee Association, appellee's obligations would be sat-

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[12]Insurance Code Section 11778.

[13]Insurance Code Section 11774.

[14]Insurance Code Section 11771.

[15]Revenue and Taxation Code Section 12203.

[16]Insurance Code Section 11797.

[17]Insurance Code Section 11793.

[18]19 ops. Cal. Atty. Gen. 249, 251 (1952).

[19]Insurance Code Section 11873.

isfied, like any other bankrupt member, from Association funds and not from the State coffers.[20]

There is a distinct advantage derived from such a system. Not only does appellee provide a permanent market for workers' compensation insurance at no cost to the public, but it functions as "a 'yardstick' for the industry by maintaining fair premium rates for employers and fair treatment for their injured employees."[21] An early report of the Industrial Accident Commission (precursor to the Workers' Compensation Appeals Board) "noted that the very purpose of creating the State Fund was to make impossible a private insurance monopoly."[22]

Thus, appellee's presence prevents a single carrier from dominating the market and establishing a monopoly.

C. The Industrial Injury Determined the Basis for Awarding Benefits and Imposing Liability

On March 12, 1978, Kenneth V. Atkinson, a fireman for the City of Torrence, appellant, died. His surviving dependent filed a death claim for workers' compensation benefits. The claim was based on the theory that the employee's death was due to cumulative trauma during the full time of his employment with appellant, 1956 to 1977. Section 5500.5 provided that only the last four years of injurious employment preceeding the date of injury would be considered in assessing liability. By virtue of this provision, appellant, which was permissibly uninsured, i.e. self-insured and had been since 1971, was held liable for the total death benefit.

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[20]Insurance Code Section 1067 et seq.

[21]2 Hanna, op. cit. supra, (Section 2.04 [2]); Herlick, op. cit. supra, (Section 1.20).

[22]Background Notes for Workers' Compensation Subcommittee Interim Hearing on the Subject of Reforming California Workers' Compensation Laws, Assembly Committee on Finance, Insurance and Commerce, Fall 1977, p. 297.

Prior to 1971, appellant was insured for workers' compensation with appellee. Appellant contends that the insurance agreements entered into between it and appellee provided for contribution and that appellee should pay a proportionate share of the award. The facts will demonstrate, however, that appellant is solely liable under the law that existed at the time of injury and that there was no impairment of contract.

The terms of the insurance agreements provided that when an injury occurs, benefits will be provided under the Workers' Compensation Laws of the State of California. Specifically, the charging paragraph, which created the obligations of the parties, stated that appellee agreed "to pay promptly and directly to any person entitled thereto *under the Workers' Compensation Laws* . . . , and as therein provided, any sums due for compensation . . . , to be directly aid primarily liable . . . to pay the compensation, if any, for which the (City) is liable . . . , and (to) be bound by and subject to the orders, findings, decisions or awards rendered against the (City) *under the Workers' Compensation Laws* . . ." (emphasis stated).

It is pertinent to note that appellant's Statement of the Case cites a portion of the above text and egregiously omits the phrase "under the Workers' Compensation Laws." App. Br. 2, 5, 15. Appellant selectively recites a segment of the insuring paragraph as evidence of the fact that it had a right of contribution. Appellee will demonstrate that the omitted language is essential because it establishes the rights and obligations of the contracting parties. Appellant's failure to include the phrase is compounded by its disinclination to discuss it. As appellee will later note, this provision, including the deleted phrase, was the basis for the California Supreme Court's decision.

The import of the contract language is readily apparent. The agreement clearly indicates it was the intent of the

parties to be bound by subsequent changes in the law. Furthermore, the language merely restates Insurance Code Sections 11651 and 11654, which establish workers' compensation law as essential provisions of every workers' compensation policy.

D. The Historical Development of Labor Code Section 5500.5

A brief comment on the historical development of Section 5500.5 is relevant. First enacted in 1951, Section 5500.5 provided a means whereby an injured worker could litigate a cumulative injury and the Workers' Compensation Appeals Board could resolve it expeditiously. It permitted the injured to elect to go to trial against one employer or carrier and recover the whole award, after which that employer or carrier could seek contribution from other responsible parties.

In 1973, the Legislature amended Section 5500.5 to limit the period of hazardous employment that could be held accountable in a cumulative injury case. This reform was deemed necessary for a variety of reasons. It would facilitate rate computation because statistics would be easier to gather. This in turn would be reflected in more accurate premiums charged California employers. Insurance reserves could be reduced, which in the case of appellee would increase the dividends distributed to its insureds. The enactment would ease the heavy burden of cases on the Workers' Compensation Appeals Board and expedite litigation. It would also provide a safer work environment because liability would be more closely tied to the last employer, who is best able to provide a safe place to work. After legislative hearings involving testimony from all parties in the workers' compensation industry, including public entities such as appellant, the Legislature chose to limit liability for continuous trauma injuries to five years immediately preceding the date of injury or last exposure.

Again in 1977, the legislature modified Section 5500.5 to provide for a stepped reduction to one year by 1981. Both the 1973 and the 1977 amendments provided for reduction in the period of liability, the only difference being that in 1973 the Act provided what is commonly known as "the single employer exception." This exception, contained in subsection (d), provided that the whole period of hazardous employment would be held responsible if an employee worked for more than five years with one employer. It was deleted in 1977.

The central theme of appellant's case is that the legislature should have retained the "single employer exception" when it amended the Act in 1977. Paradoxically, appellant concedes that it would be bound by subsequent legislative enactments increasing the level of benefits to injured workers and that no impairment of contract would occur but denies that the legislature could limit the period of liability in cumulative trauma cases for *all* employers. App. Br. 10. Stated differently, appellant contends that the United States Supreme Court should create an exception for it or declare the whole provision unconstitutional.

E. The Proceedings Below

Following an unfavorable decision at the administrative trial level, appellee petitioned to the Workers' Compensation Appeals Board, which in a three-panel decision unanimously overturned the ruling. The Board reasoned that the 1973 and 1977 amendments had the same objectives and that appellant's right of contribution was statutory and not based on common law.

Appellant appealed to the District Court of Appeal urging a reversal of the Board's decision on the ground that the contract was impaired because appellee was contractually obligated to pay a portion of the award. The District Court of Appeal unanimously rejected appellant's

contention, stating that "The policy, in substance, requires the insurer to pay what the law requires," and that "the possibility of changes in the applicable law has become party of the risk assumed by the compensation carrier and the self-insureds."

Appellant's appeal to the California Supreme Court was similarly rejected in a 6 to 1 decision. The Court found that the contract was not impaired because the parties agreed to be bound by the workers' compensation laws of the State of California.

Appellant's argument presented to the U.S. Supreme Court is a substantial departure from that taken in the lower courts. First, it represented in two oral arguments that its position did *not* depend on whether or not the State was a party to the contracts. Second, it did not make the claim that California established a State monopoly for selling insurance to public entities. In seven appellate briefs and over 170 pages of argument, including various petitions, appellant never used the word "monopoly" once.

ARGUMENT

I

Appellant's Contracts Are Not Impaired

The facts clearly demonstrate that the parties agreed to be bound by the workers' compensation laws of the State of California. It is undisputed that the loss manifested itself during appellant's period of self-insurance and that the law on the date of injury imposed the full responsibility on appellant. Appellant asks the court to *assume* an impairment, steming from an alleged lost economic advantage. To substantiate the claim of impairment, appellant refers to a *portion* of the insuring agreement, as if the deleted crucial language was of no significance. Yet, the omitted language was the very essence of the contract and the grounds on which the California Supreme Court based its decision. The

failure to come to terms with the contract language and the lower court's reasoning evidences the weakness and lack of substance of appellant's Jurisdictional Statement.

Appellant's contracts with appellee are still viable and enforceable for injuries that manifest themselves during the period of coverage that the contracts provide. Appellee remains liable for industrial injuries occurring during its coverage. In the case at bar, the injury occurred during appellant's coverage. Section 3208.1 provides that the date of injury for cumulative injuries shall be determined by Section 5412. Section 5412 establishes the date of injury in a cumulative trauma case as the date on which the employee *first* suffered disability.[23] Applying Section 5412 to the instant case, the date of injury occurred during appellant's coverage and the law in effect on *that date,* not the date the parties executed the agreement, governs. On the date of injury, Section 5500.5 limited liability to four years preceding the date of injury, all of which occurred during appellant's self-insurance coverage. However, had the date of injury occurred during appellee's period of coverage, appellee would have been responsible and the appropriate law applied. Thus, it is incorrect to state, as appellant does repeatedly, that the contracts were abrogated and that appellant had an unqualified contractual right to seek reimbursement. Consistent with its refusal to cite or discuss the full text of the contract, appellant did not attempt to define the date of injury or the application of Sections 3208.1 and 5412 to the facts.

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[23]"The date of injury in case of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

A. Workers' Compensation Law Is Subject to Change

Appellant confuses disability with exposure. This confusion is apparent in that appellant speaks of the total abrogation of appellee to pay for workers' compensation injuries on one hand and at the same time concedes that it "sought contribution" from appellee. App. Br. 12, 8. It is not the injured's recovery that is involved. All benefits have been paid to the applicant. The central issue of appellant's liability and its obligation to be bound under the laws of the State of California.

Appellant had no right to assume that the law would remain fixed. Since the Boynton Act, the Legislature has not hesitated to amend the Workers' Compensation Law and, with the exception of 1921, new laws have kept pace with changing and developing needs in the workers' compensation field. The dynamic nature of workers' compensation law stems directly from the constitutional mandate. One must ask, how effectively could the Legislature fulfill its obligation if the law remained static? As industry creates new manufacturing techniques and processes giving rise to new risks and injuries, can the Legislature meet its commitment by remaining inert?

The judicial system has, and is, a substantial force in developing workers' compensation laws. From its inception when the California Supreme Court reviewed the California Compensation Act and declared it constitutional, the courts through statutory interpretation have had an impact on rights and obligations and at times have found them to be different from what the contracting parties originally believed them to be. Yet, these decisions have withstood constitutional challenges. Section 5500.5 is no exception and owes its origin to the decisional rule announced in *Colonial Insurance Co. v. I.A.C.*,[24] which the Legislature adopted in

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[24]29 Cal.2d 79, 179 P.2d 884 (1946).

1951. Subsequent constitutional challenges were raised in a number of cases involving Section 5500.5 and rejected.[25] *Argonaut Mining Co. v. I.A.C.*, in particular, rejected a constitutional challenge based on impairment of contract.[26] Judicial interpretations in *Fireman's Fund Indemnity Co. v. I.A.C.* and *Beveridge v. I.A.C.* expanded the original language to include injuries due to micro-trauma.[27] In *Harrison v. WCAB*, the courts upheld the 1973 amendments to Section 5500.5, concluding that they were consistent with the constitutional imperative.[28]

When appellant voluntarily elected to become self-insured in 1971, it did so against a background of legislative review in the workers' compensation field.[29] A significant number of states enacted reform legislation following intensive investigative hearings. New York, Oregon, Maryland, Idaho and Pennsylvania all adopted reform legislation after studies and hearings in the sixties.[30] California, in particular, invited improvements "directed toward reducing litigation and separating the administrative and adjudicatory functions," following a 1965 report of the Workers' Compensation Study Commission.[31] It is apparent that the reform climate that preceded appellant's decision to become self-insured in 1971 was a sufficient reason

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[25]*Subsequent Inj. Fund v. I.A.C. (Koski)* 49 Cal.2d 354, 317 P.2d 8 (1957); *Argonaut Mining Co. v. I.A.C.*, 104 Cal.App.2d 27, 230 P.2d 637 (1951); *Pacific Employers v. I.A.C.*, 219 Cal.App.2d 634, 33 Cal.Rptr. 422 (1963).

[26]Ibid., 104 Cal.App.2d 27, 230 P.2d 637 (1951).

[27]39 Cal.2d 831, 250 P.2d 148 (1952); 175 Cal.App.2d 592, 346 P.2d 545 (1959).

[28]44 Cal.App.3d 197, 118 Cal.Rptr. 508 (1974).

[29]The Report of the National Commission on State Workers' Compensation Laws, (July 1972), Ch. 7 "A Time for Reform."

[30]id., p. 121-122.

[31]id., p. 121; 2 Hanna, op. cit. supra, Section 101 [3]; Stats. 1965, Ch. 1513, Section 214.

in itself for anticipating changes in workers' compensation laws that might follow, particularly in the areas of improving and expediting the litigation process.

B. The United States Supreme Court Has Held That Subsequent Legislative Enactments Do Not Impair Contracts Which Incorporate Changes in the Law

In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, this Court found that a contract was not impaired by a subsequent state act that imposed a restriction on a contract provision dealing with the price of natural gas.[32] The Court reasoned that state price restrictions were foreseeable because supervision of the industry was "extensive and intrusive," and the contract price clauses "were structured against the background of regulated gas prices." Furthermore, "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law."

The principles discussed in *Energy Reserves,* supra, are applicable to the instant case. The insurance agreement recognized that the parties would be bound by state law and workers' compensation is a field where legislative enactments and judicial decisions are extensive and intrinsic in the industry, the constitutional mandate and Insurance Code Sections 11650-11656 serving as the basis for all authority. Appellant had just as much opportunity to foresee changes in the law as the energy company did in *Energy Reserves,* given the legislative history of Section 5500.5, the long history of statutory and judicial presence in workers' compensation and the concern expressed by state and federal governments regarding expeditious delivery of benefits to injured workers. In addition, the rule imposing liability on the employer with the last injurious

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[32] .... U.S. ...., 74 L.Ed.2d 569, 582-583 (1983).

exposure was applied in Longshoremen and Harbor Workers' cases for 16 years before appellant became self-insured.[33] Similar rules achieving the same result as Section 5500.5 were already evident in other states.[34]

In *U.S. Mortgage v. Matthews,* the U.S. Supreme Court reversed a finding that a state statute impaired foreclosure rights on the ground that the contract itself recognized that these rights might be effected by subsequent legislation.[35] The mortgage agreement provided a sale of property according to certain statutes "or any amendments or additions thereto." Subsequent legislation limited the lender's rights to foreclose or default. The U.S. Supreme Court reversed a lower court finding of impairment of contract, noting that the contract language "embraced the amendments and additions" to the statute stated in the mortgage agreement. The workers' compensation agreement between appellant and appellee indicated an intention of all the parties to incorporate California law when a claim was presented and expressly recognized that the parties would be bound by subsequent changes in the law.

II

Labor Code Section 5500.5 is Reasonably Related to Legitimate State Goals

A. The 1977 Amendments Had a Legitimate Objective

Appellant incorrectly characterizes Section 5500.5 as having no legitimate state purpose except "the abrogation of State Fund's financial obligations to City and similar employers . . ." App. Br. 19. Appellee will demonstrate that the section has legitimate state goals that are con-

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[33]*Travelers Insurance Co. v. Cardillo,* 225 F.2d 137 (2nd Cir. 1955); 4 Larson, op. cit. supra, Sections 95.12, 95.21, 95.25.

[34]Post, fn. 41, page 17 for a discussion of other states applying a similar rule.

[35]293 U.S. 232.

sistent with the Legislature's plenary power under Article XIV, Section 4 of the California Constitution.

It is evident that the section does not refer to appellee and applies to the whole workers' compensation industry in California. Appellant recites the "single employer exception" contained in the 1973 amendments but dismisses the main provisions as "not pertinent." App. Br. 7. Yet, both the 1973 and 1977 amendments limited the period of legal responsibility for cumulative trauma injuries. A reading of both sections fails to disclose a legislative intent to confer a benefit on appellee. Appellant's attack on the 1977 amendments is an attempt to have the courts obliterate the statute and formulate a plan whose history proved unworkable and destructive.

Preceding the statutory amendments to Section 5500.5, Congress enacted the "Occupational Safety and Health Act of 1970," which established a National Commission on State Workmen's Compensation Law.[36] The purpose of this act was to study workers' compensation laws to determine "if such laws provide an adequate, prompt and equitable system of compensation."[37] A report was prepared and submitted to the President and Congress in 1972. One of the objectives for a modern workers' compensation program was "an effective system for delivery of the benefits and services," so that the goals of workers' compensation laws could be "met comprehensively and efficiently."[38] Excessive litigation was one aspect interfering with a prompt delivery system.[39] The study indicated the need for certain minimum reforms, and it was evident to the states that a

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[36]84 Stat. 1590.

[37]The Report of the National Commission on State Workmen's Compensation Laws, p. 150.

[38]Id., p. 15.

[39]Id., pp. 100, 119.

uniform federal workers' compensation law was a possibility.[40]

In 1973, California amended Section 5500.5, bringing California in line with a substantial number of other states and the federal courts.[41] Since the legislation reduced the

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[40]Id. Ch. 7.

[41]*Traveler's Insurance Co. v. Cardillo*, op. cit, supra; *General Dynamics Corp. v. BRB*, 265 F. 208 (2nd CCA 1977); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, (9th CCA 1979), *cert. den.*; Proceedings of Assembly Committee on Finance, Insurance and Commerce into Problems of Insuring Payments of Compensation for Cumulative Occupational Injurious Interim Hearings, (January 12 and 19, 1977) (hereafter "1977 Assembly Committee Hearings.") Pages 399-401 provided the Committee with the following analysis, showing imposition of liability on the last employer or carrier in 33 states:

"States which limit liability to the last day of employment:

1. Illinois—Chapter 48, Section 172.36 (d)
2. Indiana—Section 22-3-7-33
3. Wisconsin—Section 102.01 (f)

II. States which limit liability to the last employer where the employee was injuriously exposed and, either by statute or case law, further limit liability to the last carrier on the risk with said employer:

(A) By statute

1. Vermont—Section 1008
2. Arkansas—Section 81-1314 (b)
3. Colorado—Section 8-51-112
4. Florida—Section 440.151 (5)
5. Georgia—Section 114-809
6. Kansas—Section 44-5a06 (Chapter 203, Laws 1974)
7. Maine—Title 39, Section 186
8. Maryland—Article 101, Section 23 (b)
9. North Carolina—Section 97-57
10. Oklahoma—Title 85, Section 11 (3)
11. Tennessee—Section 50-1106
12. Virginia—Section 65.1-50

(B) By Case Law

1. Arizona—State Comp. Fund v. Joe, 543 R. 2d. 790

period of accountable liability, it also limited the number of employers and insurers involved in the litigation process. The benefits flowing from such legislation were consistent with the constitutional requirements to provide a complete system of workers' compensation, including providing for and regulating adequate insurance coverage. Not only did the reduced period allow for more accurate underwriting and premium calculations but it also relieved the litigation logjam that was effectively denying benefits to injured

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2. South Carolina—Glenn v. Columbia Silica, 112 S.E.2d 711

3. Pennsylvania—Gaydosh v. Richmond Radiator, 63 A.2d 502

4. Oregon—Davidson Baking v. Industrial Indemnity, 532 P.2d 810

5. New Jersey—Marko v. Barnett Foundry, 147 A.2d 579

III. States which limit liability to the last employer where the employee was injuriously exposed. No statutory or decisional clarification as to carriers during the employment:

1. Montana—Section 92-1310
2. Idaho—Section 72-102 (17)
3. Texas—Section 8306, Part 1, Section 24
4. New Mexico—Section 59-11-11
5. Missouri—Section 287.063 (2)
6. Alabama—Title 26, Chapter 5, Article 2c., Section 313 (41)
7. Iowa—Title V, Section 85 A. 10
8. South Dakota—Section 62-8-15

IV. States which limit liability to the last employer where the employee was injuriously exposed, including all carriers who insured the risk during the period of employment.

1. Utah—Statute 35-2-14, Case—State Insurance Fund v. Industrial Commission, 399, P.2d 208

V. States which assess liability on the carrier which is on the risk at the time the employee actually suffers disability:

1. Delaware—Alloy Surfaces Co. v. Cicamore, 221 A.2d 480
2. Massachusetts—see 100 CJS, Section 373, fn. 87
3. Minnesota—Bituminous Car. Corp. v. Hartford, 167 N.W.2d 741
4. Alaska—Lloyds v. Alaska Indus. Bd., 160 F.Supp. 248

workers. Thus, the amendments were consistent with the objectives of the National Commission on State Workers' Compensation Laws, i.e. to provide for an effective delivery system of benefits and services. "The purpose of these amendments was to provide greater certainty to insurers in anticipating costs and necessary reserves, to simplify the proceedings by reducing number of employers and insurers required to be joined as defendants and to reduce the burden placed on the entire system by the former procedures."[42] The benefits would also inure to self-insureds.[43] The amendments provided immediate relief from a "procedural morass" that was impeding litigation to the degree that the delay in providing benefits was "in violation of the constitutional mandate that workers' compansation be determined expeditiously."[44] "Forces ordinarily opposed to one another, in practical effect, joined to encourage passage of legislation which was obviously designed to ameliorate the pressing problems that have arisen under the old statutory scheme."[45]

In 1977, the Legislature further modified Section 5500.5 to accomplish the valid objectives begun in 1973. In view of the legislative history surrounding the passage of these amendments and the judicial decisions analyzing the legislative process, the purpose of the statute was to achieve legitimate goals consistent with the constitutional obligation to provide a complete workers' compensation system. Appellant cannot substantiate its broad, unfounded charge that the statute had a limited, narrow purpose, to benefit appellee.

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[42]*Flesher v. WCAB*, 23 Cal.3d 322, 328; 152 Cal.Rptr. 451 (1979).

[43]1977 Assembly Committee Hearings, op. cit. supra, p.69.

[44]*Harrison v. WCAB*, 44 C.A.3d 197, 205; 118 Cal.Rptr. 508 (1974); 1977 Assembly Committee Hearings, op. cit. supra, p.55, testimony of Melvin A. Witt, Chairman of California Workers' Compensation Appeals Board.

[45]*Harrison v. WCAB*, Ibid

B. The State May Exercise Its Police Power to Accomplish a Legitimate Goal

The state may exercise "its essential reserve power to protect the vital interests of its people."[46] In *El Paso v. Simmons,* the U.S. Supreme Court upheld a state statute that restricted a former landowner's right to reinstitute title and found no impairment of contract.[47] Previous to the imposition of a 5 year limitation from the date of forefeiture, Texas had no restriction, and a former landowner could institute recovery proceedings for as far back as when title was first acquired, which in the case at bar was over 40 years. The Court noted that the "massive litigation to which this gave rise" was expensive and interfered with land use. In approving the statute, the U.S. Supreme Court noted that the purpose of the statute was to restore stability and integrity to land titles, allowing the State of Texas to conduct the administration of land titles in a business like manner.

In the present case, as in *El Paso,* the Legislature had a vital interest to protect, the integrity of the workers' compensation system, and after legislative hearings, adopted a solution that met with the approval of "forces ordinarily opposed." Appellant seeks to resurrect a statutory scheme that these forces opposed, one that gave rise to a "procedural morass."[48] Where the legislative proceedings reflect an empiric process, following legislative hearings and analysis that involves consideration of future benefits and burdens and is based on the opinion and views of a diversity of interests, it cannot be said that the resultant law should be rejected as an impairment of contract on the ground that the legislature acted arbitrarily.[49]

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[46]*Faitoute Iron and Steel Co. v. City of Asbury Park,* 316 U.S. 502 (1941).

[47]379 U.S. 497 (1965).

[48]*Harrison v. WCAB,* op. cit. supra, p.205.

[49]*East New York Savings Bank v. Hahn,* 326 U.S. 230 (1945).

In a related matter, the U.S. Supreme Court considered the constitutionality of the Black Lung Benefits Act of 1972 and, in particular, certain statutory presumptions.[50] Although the charge of unconstitutionality was based on due process arguments, the case is appropriate because it deals with workers' compensation and the judicial analysis of a legislative program that attempts to achieve substantial fairness for all employers and at the same time institute a benefit program for injured workers. The Court noted that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. (citations) And this Court long ago upheld against due process attack the competence of Congress to allocate the interlocking economic rights and duties of employers and employees upon workmen's compensation principles analogous to those enacted here, regardless of contravening arrangements between employer and employee."[51] Rejecting a claim that present employers should not be held responsible for former employees' disabilities because the liability was unexpected, the Court stated, "But our cases are clear that legislation readjusting rights and burdens is not unlawful because it upsets otherwise settled expectations."[52] Responding to the contention that the law was unfair because present employers suffered the full burden of compensation while early operators were excluded from payment, the Court stated, "it is for Congress to choose" and "We are unwilling to assess the wisdom of Congress' chosen scheme for examining the degree to which the 'cost savings' employed by operators in the pre-enactment

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[50]*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[51]Id., p.766.

[52]Id., p.767.

period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer."[53]

Appellant's argument is substantially the same as the coal miner operator's arguments in *Usury*. In an attempt to demonstrate unreasonableness, it relies on the unfounded claim that the sole basis for the legislation was to benefit the appellee. In order to bolster this contention it claims the State was a party and that its coffers will be unjustly enriched. With respect to the latter, the financial relationship and daily operation of appellee's business is separate and distinct from the State. Appellant's extra-record arguments regarding reserves and finances have no bearing on the case, since these funds do not go to the State but are returned as dividends to appellee's policyholders, many of whom are insured governmental entities. Although appellant seeks to show a windfall profit by citing the premiums it paid, it does not state that during the period of its insurance coverage with appellee it received the benefit of dividends, coverage and complete insurance services.

Appellant readily concedes that the Legislature can initiate changes that impose substantial economic burdens without impairing any agreements between it and appellee. App. Br. 19. Since 1971 when petitioners elected to be self-insured, maximum temporary disability indemnity increased from $70 a week to $196.[54] The maximum death benefit increased from $55,00 to $85,000.[55] All of the increases imposed a substantial economic burden on the parties, perhaps even greater than the figures that appellant cites, yet it does not claim an impairment. This patent inconsistency is demonstrated by the fact that the duties and obligations all stem from the same agreement, one in

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[53]Id., p.768.

[54]Labor Code Sections 4453, 4453.1, 4469.

[55]Labor Code Section 4702.

which the parties agreed to be bound by the workers' compensation law. It also demonstrates the fallacy of assuming an impairment from a supposed economic disadvantage.

The issue is whether or not the Legislature exercised its plenary power in a reasonable fashion for a legitimate public purpose, not whether or not the appellant suffered a detriment. The contract clause is not impaired by "legislation adjusting the rights and responsibilities of contracting parties upon reasonable conditions and of a character appropriate to the public purpose justifying its adoptions."[56]

Appellant also benefits from the Act by virtue of the fact that it can calculate reserves and gather statistical data more easily. On the basis of this information, it can predict losses and adjust reserves more accurately, just as other insurance carriers and self-insureds can do. Of course, appellant is not encapsulated in its present mode of self-insurance. Appellant can simply elect to become insured with appellee.

Thus, appellant's plea for relief ignores the present and potential benefits that it also enjoys from the legislation.

Appellant also disregards the benefits that the injured worker will derive from a prompt and efficient delivery system. Imposing liability on the last employer provides the incentive for that entity or person to provide a safe place to work; since the last employer is the best position to provide a safe work environment, it is reasonable that the risk of loss should rest with that employer, who is obligated to provide a safe place to work by virtue of Labor Code §§ 6400 through 6404.

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[56] *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

C. The Claimed Impairment Is Insubstantial

Although the facts do not demonstrate an impairment, it is appropriate to respond to appellant's authorities dealing with the legitimacy of the legislation when an impairment is found.

Before doing so, however, appellee wishes to state that appellant abandoned the position that appellee and the State of California were one and the same. Appellant represented to the lower courts that for purpose of its argument, appellee was the same as any other insurance carrier and its legal position did not depend upon appellee's relationship to the State of California. Appellee points this out for two reasons: first, this representation made to the lower court explains why the decisions did not discuss this aspect to the case; second, it demonstrates the lack of substance of the Jurisdictional Statement.

Appellant's claim of impairment must be put in perspective. The legislation affects a small percentage of workers' compensation claims. In 1977, the Chairman of the Workers' Compensation Appeals Board testified that "The percentage of cumulative injury claims to all new claims filed before the Board is approximately 12½%."[57] The real effect of the act, however, may be on substantially fewer cumulative injuries than 12½%. For instance, with the passage of time fewer and fewer workers would have had employment pre-dating 1971, and appellant would have eventually had to assume all responsibility, regardless of the amendment. The elimination of the "single-employer exception" merely accelerated what would have occurred in any event. In addition, as longstanding employees leave appellant's employment to work elsewhere, that prospective employer assumes

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[57] 1977 Assembly Hearings, op. cit. supra, p.58.

what ordinarily would have been appellant's liability, should those employees initiate cumulative trauma claims.[58]

D. Appellant's Authorities Are Distinguishable

Appellee believes that the code sections and the authorities cited in appellee's Statement of Facts amply demonstrate that the State of California is not a party and that appellee is as much a private party to the insurance agreements as any other carrier. The present case is clearly distinguishable from *Allied Structural Steel Co. v. Spannaus* and *U.S. Trust Co. of New York v. State of New Jersey,* relied on by appellant.[59] Both cases deal with the legislative impairment of common law rights and do not deal with workers' compensation or rights arising out of statute.

In *U.S. Trust of New York v. State of New Jersey,* the State sought to undermine the security of its bonds by introducing legislation which would repeal certain specific covenants between the State and bondholders. In the instant case, the state is not a party, and the legislation does not attempt to repeal any covenant in any agreement but merely recites the period of employment that is accountable in a cumulative trauma case, a significant difference from *U.S. Trust of New York.*

In *Allied Structural Steel Company v. Spannaus,* the act dealt with pension rights and did not pertain to a broad general economic or social problem or attempt to

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[58]"The insurance industry formed these amendments and reasoned that the total burdens and benefits upon employers and insurers would more or less even out, for which they might be required to assume a longer liability in some cases, they would also be absolved of liability in other cases." *Flesher v. WCAB,* op. cit. supra, p. 328.

[59]*Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978); *U.S. Trust Co. of New York v. State of New Jersey,* 431 U.S. 1 (1977).

legislate in an area already subject to state regulation at the time the contract was executed. Appellee contends that the legislative history of workers' compensation law in California, and in particular Labor Code Section 5500.5, amply refutes the argument that the amendments did not deal with a broad social purpose in an area where the Legislature previously acted.

Citing *Home Building & Loan Association v. Blaisdell,* petitioner decrys the legislation on the ground that there was no emergency.[60] However, the presence or absence of an emergency is not dispositive of whether or not there is an impairment. Although an emergency may serve as the occasion for the exercise of the police power, it does not create it and the absence of one does not ipso facto indicate an impairment. *Viex v. South Ward Association* so held.[61]

Where, as in the instant case, the legislation is seeking to provide a remedy in a field where the Legislature is vested with plenary power and is mandated to the act, it cannot be said that the legislation performed in the absence of an emergency is invalid as offensive to the contract clause. However, appellee does not concede that there was no emergency, only that the presence of one is not essential to the case at bar.[62]

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[60]290 U.S. 398 (1934).

[61]310 U.S. 32, 38-39.

[62]*Flesher v. WCAB* and *Harrison v. WCAB,* op. cit. supra, describe conditions that indicate the need for expeditious legislation.

CONCLUSION

The 1977 amendments to Labor Code Section 5500.5 were the result of legislative hearings that considered the opinions of diverse interests in the workers' compensation field. The single most persuasive argument against the claim that the legislation was solely to confer a benefit on appellee is that those opposing parties were able to agree on amendments that restored stability and integrity to an industry that was floundering. The fact that a similar rule is followed in other jurisdictions, including the federal system, reinforces the constitutional legitimacy of the statute. Appellant's entire argument ignores the national trend, the legislative hearings and the state of the industry when the amendments were considered. Finally, the State of California derived no economic advantage from the legislation and the contention that a strict standard of review is required is inapplicable.

Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the California Supreme Court.

Respectfully submitted,

By Frank Evans
Attorneys for Appellee
State Compensation
Insurance Fund

82-1436

No. A-559

IN THE

Supreme Court of the United States

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE COMPENSATION INSURANCE FUND,

Appellees.

REPLY BRIEF.

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Appellees.

REPLY BRIEF.

This Reply Brief by City of Torrance (City) is necessitated by the invective, innuendo and outrightly misleading statements made by appellees. This appeal concerns a relatively simple issue — whether, after City (and numerous other public entities) paid millions of dollars to State Fund for insurance covering claims of injured workers — the City can be required to pay a second time for such claims. A second payment would be required because the California Legislature has retroactively abrogated State Fund's obligation to honor its insurance contracts. As a result of this statutory amendment, State Fund will retain $70 million dollars which it had collected to pay claims of injured workmen.

In responding to City's Jurisdictional Statement, appellees and amici curiae on their behalf make erroneous and misleading contentions:

First, because State Fund earns a profit and, in certain managerial respects, resembles a private insurance carrier, State Fund represents it is not a state agency. State Fund hopes this Court will ignore the specific holdings of the California courts for almost half a century that "the State Compensation Fund is an agency of the State." *Gilmore v. State Comp. Ins. Fund*, 23 Cal. App.

2d 325, 329, 73 P.2d 640 (1937). State Fund further believes this Court will disregard the monopoly granted by the Legislature to State Fund for selling workers' compensation insurance to public entities in California.

Second, State Fund argues there is no impairment of City's contract of insurance. State Fund asserts that although it contractually pledged itself to "pay promptly and directly . . . any sums due", it need not pay any cumulative trauma claims made against the City despite City's payment of insurance premiums for such coverage. Simultaneously, State Fund argues it may keep the reserve of $70 million established to pay for such claims.

Finally, appellees contend State Fund's refusal to pay claims in accordance with its insurance policies does not constitute a substantial impairment of its contract. In doing so, they confuse two different juridical relationships: (1) the *contractual* relationship between City and State Fund, with (2) the *status* relationship between City, as employer, and its employees. State Fund, however, fails to cite any decision concluding that a legislature has an unrestricted right to retroactively abrogate *contract* rights simply because it may change compensation benefits for injured employees.

1. State Fund Is a State Agency Which Has a Monopoly in Providing Workers' Compensation Insurance to Public Entities.

State Fund misleadingly asserts there is "no authority for the proposition that public agencies must buy *all* of their insurance from the State Compensation Insurance Fund or that they even have to be insured with appellee." (State Fund Br. at 3). Regrettably, that statement is a misleading and overbroad generalization. As indicated in City's Jurisdictional Statement, this case involves *only* workers' compensation insurance. Accordingly, it does *not* involve marine insurance *nor* credit insurance *nor* even medical malpractice insurance. As to workers' compensation insurance, the California Legislature granted State Fund a monopoly. See Ins. Code § 11870. A public entity must insure itself with State Fund or be self-insured. *Id.* Despite State Fund's misleading assertions to the contrary, State Fund has a statutory monopoly.

State Fund further desires to avoid the constitutional prohibition against impairing contracts and the rulings of this "Court [which] has held a governmental unit to its contractual obligations when it enters financial or other markets." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 51 U.S.L.W. 4106, 4109 (1983). State Fund misleadingly represents it is on "an equal footing with all other compensation carriers." (Br. at 4). That representation is false. California courts for almost half a century have held State Fund is a direct arm of the State of California: "The State Compensation Insurance Fund is an agency of the State." (*Gilmore v. State Comp. Ins. Fund*, 23 Cal. App. 2d 325, 329, 73 P.2d 640 (1937)). Notably, State Fund cites *Gilmore* (Br. at 4, n. 6); however, it ignores the express holding in representing the contrary to this Court. Numerous other cases also conclude State Fund is a state agency.[1] The conclusion of the California courts requires no extensive analytical support. Even a cursory review of State Fund's extraordinary powers renders that conclusion inescapable.[2] Similarly, a glance at its management structure (who are California civil executive officers)[3] or

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[1]See *e.g. Yedor v. Ocean Acc. & Guar. Corp.*, 85 Cal. App. 2d 698, 701, 194 P.2d 95 (1948); *DeCampos v. State Comp. Ins. Fund*, 75 Cal. App. 2d 13, 17, 170 P.2d 60 (1946).

[2]The Legislature has meticulously regulated State Fund and granted it extraordinary powers, even for a state agency. State Fund may establish accounts in the State Treasury. Ins. Code § 11800.1. The California Treasurer, moreover, is custodian of its securities. Ins. Code § 11788. The California Controller may similarly establish special ledger accounts on State Fund's behalf. Ins. Code § 11800.2. To protect the directors of State Fund, the Legislature has created a special immunity against personal liability. Ins. Code § 11772. The Legislature has similarly established certain immunities as to types of claims and limited State Fund's liability in cases of suit. Ins. Code §§ 11801, 11771. No private insurance company has such a panoply of legislatively created rights and immunities.

[3]Structurally, the Governor appoints State Fund's five directors; its chairman is statutorily mandated to be California's Director of Industrial Relations, another state official. Ins. Code § 11770. The chief managerial employees of State Fund are legislatively designated as state civil executive officers. Gov't. Code § 1001. The Fund's manager even files a special oath with the Secretary of State. Ins. Code § 11786.

its employees who are protected by civil service precludes any other conclusion.[4]

2. Legislative Abrogation of State Fund's Contractual Commitments After Receipt of Premium Payments Constitutes an Impairment of City's Insurance Contracts.

State Fund deposited in its coffers premium payments made by City and numerous other public entities. Those payments were made in consideration of State Fund's pledge to pay all claims assessed against its insureds. State Fund now asserts, however, it may retain this 70 million dollar reserve while it dishonors its pledge. State Fund furthermore contends the City (and other public agencies) must pay for employee claims after having previously paid for such coverage; however, it asserts "appellant's contracts are not impaired." (Br. at 10).

In asserting City's contract has not been impaired, State Fund unjustifiably attempts to confuse two separate juridical relationships: (1) State Fund's *contractual* obligation to provide insurance to City; with (2) City's *status* relationship as an employer of its employees. As described in the Jurisdictional Statement (at 15-16), the employer-employee relationship is one of mere status. "[T]he right to, and liability for, compensation established by the [workers' compensation] act are not founded upon contract, but are statutory rights and duties arising from the employer-employee relationship, and are imposed by the law as incidents of that status." (*Argonaut Mining Co. v. Ind. Acc. Com.*, 104 Cal. App. 2d 27, 29, 230 P.2d 637 (1951)). Permissible modifications of the *status* relationship between employee and employer do not establish a constitutionally acceptable basis for

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[4]State Fund employees take a state oath which is filed with the State Personnel Board. Ins. Code § 11873(b), Gov't. Code §§ 18153, 18155. The Board disciplines such employees through civil service regulations. Ins. Code § 11873(b), Gov't. Code § 18703. Furthermore, promotions of employees are subject to competitive examinations. Ins. Code § 11873(b), Gov't. Code §§ 18936, 18950. They are members of the public employees retirement system. Ins. Code § 11873(b), Gov't. Code § 20000 *et seq*. Furthermore, they receive state-provided medical, hospital and dental care. Ins. Code § 11873(b), Gov't. Code §§ 22751 *et seq*., Gov't. Code §§ 22754, 22950.

upsetting the separate *contractual* undertaking between City and State Fund. As this Court has held, Article I, Section 10 of the Constitution precludes impairments of *contract*, not changes in *status* relationships. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 2892, 49 L. Ed. 2d 752 (1976).

After receiving millions of dollars in premiums and creating an enormous reserve, State Fund now refuses to pay claims under its *contract* based upon the statutory amendment. Other than the decision of the state court in the instant case, neither State Fund nor any of its amici curiae cite a single decision *from any jurisdiction* approving that anomalous result. To the contrary, insurance carriers may not constitutionally disavow contractual obligations based upon legislative changes. To hold otherwise would interfere with a municipality's vested rights or otherwise impair the obligation of contract owed by an insurance company to its insured.[5] As stated in one decision cited by an amicus on behalf of State Fund:

> "[T]he company's contract under its policy is to pay *whatever workmen's compensation benefits the legislature may have seen fit to impose upon the insured municipality*. When the policy of coverage is so construed, there is no question of interference with vested rights, or impairment of the obligation of a contract, presented here." (*Douglas County v. Industrial Commission*, 275 Wis. 309, 81 N.W.2d 807, 821 (1957)).

State Fund has conceded that it would have been required to honor its contractual commitments to pay for the Atkinson claim but for the legislation. *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal.3d 371, 376, 185 Cal. Rptr. 645, 647 (1982). It nevertheless attempts to base its position of refusing to pay upon supposed implications from the policy. Under the express

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[5]In a similar decision cited by State Fund itself (Br. at 18), the court stated the same principle more colorfully:

> "If, under the facts, an employer is stuck with compensability requirements, its insurance carrier is as deeply mired. That is this case. The carrier, on the risk cannot disespouse itself from its premium-paying relative by a divorce . . ." *State Insurance Fund v. Industrial Commission*, 16 Utah 2d 269, 399 P.2d 208, 210 (1965).

terms of the policy,[6] however, State Fund agreed "to pay promptly . . . any sums due for compensation." Moreover, State Fund is the party "primarily liable . . . to pay compensation, if any, for which [City] is liable". Furthermore, State Fund agreed to be bound by . . . "all awards rendered against [the City]." State Fund conveniently attempts to disregard each of its express obligations in this case.

In the case at bar, an award has been rendered against the City. Changes in the *status* relationship of City to its employees do not abrogate State Fund's *contractual* duty to honor those claims. Under the express terms of the policy, State Fund is "bound by" any award of benefits. Furthermore, State Fund, not the City, is "primarily liable" for satisfying the award. State Fund, however, argumentatively desires to disassociate itself from the award made against the City. In essence, State Fund wants to change the language of the policy. By striking the term "Insured" and replacing it with "State Fund," State Fund might be able to argue that its responsibility is so limited. That, however, is not the language of the policy.[7]

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[6]In relevant part, the policy states:

> "State Compensation Insurance Fund . . . does hereby agree . . . (1) *To pay promptly and directly* to any person entitled thereto under the Workmen's Compensation Laws . . . any sums due for compensation for injuries, . . . ; *to be directly and primarily liable* to employees covered by this Policy . . . to pay the compensation, if any, *for which the Insured is liable* . . . ; and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards *rendered against the Insured* under the provision of Workmen's Compensation Laws of the State of California." (App. p. 33, n. 4). (Emphasis added).

[7]By applying general principles of interpretation applicable to insurance policies, the aberrant position of State Fund's argument is highlighted. But for this case, California conclusively presumes that the insurance carrier is liable to the employee "under the same circumstances and to the same amount as the employer." (*U.S. F. & G. Co. v. Indus. Acc. Com.* (1925) 195 Cal. 577, 580, 234 P. 369). Moreover, but for this case, it has been settled in California for over half a century that an insurer, by entering into an insurance contract with an employer, "[t]he insurer, assuming the risk voluntarily . . . stands in his place."

At bottom, after having paid insurance premiums to State Fund, City is being obliged to pay a second time. The City's taxpayers paid $1.5 million for insurance coverage. Those same taxpayers are now legislatively being compelled to also pay the claims of Atkinson's heirs although State Fund is "primarily liable." That is a clear impairment of City's rights.

3. The Payment of Claims by an Insured After It Has Paid for an Insurer to Assume the Risk of Such Claims Constitutes a Substantial Impairment of Contract.

In an attempt to sidestep the issue whether City's contract of insurance was impaired, State Fund asserts City should have foreseen a legislative change because "[s]imilar rules . . . were already evident in other states." (Br. at 15). Whether other states have different workers' compensation insurance programs is irrelevant. City and numerous public entities paid their premiums in California. State Fund issued the policies and received the premium payments in California. As noted above (at 5), State Fund has conceded that the policy would have continued to cover City's employees but for the legislation. The existence of other types of workers' compensation statutes in other states is irrelevant to the question whether City's contract with State Fund has been unconstitutionally impaired by the California Legislature. Assuming the experience of other states is relevant, it is apparent that almost half of them — from Arizona to New York — require an apportionment as between insurers of the same employer. Despite State Fund's sweeping generalization concerning the vast majority of jurisdictions, it is evident most states have not ac-

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(*Employers' L.A. Corp. v. Indus. Acc. Com.* (1918) 177 Cal. 771, 775, 171 P. 935). Both of these conclusive presumptions are predicated upon the conclusive statutory presumption that "insurer will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable." (Ins. Code § 11651). Even were the insurance policy ambiguous (which it is not), any such ambiguity would have to be construed against the insurer. (*Holt Rubber Co. v. American Star Ins. Co.*, 14 Cal.3d 45, 59, 120 Cal. Rptr. 415. (1975)).

cepted the position advocated by State Fund.[8]

We have read with care every citation filed in opposition to City's Jurisdictional Statement. *Not one* permits an insurer to avoid its contractual obligations based upon a subsequent change in the employer-employee benefit structure. *Not one* requires an insured employer to pay claims based upon changes in the workers' compensation law after having paid premiums for such coverage. *Not one* permits an insurer to retain the reserves established from premium payments so as to require the insured to also pay the inevitable costs of such claims.

Appellees contend that the legislative history indicates the shift in liability from State Fund to its insureds resulted from the desire to make California consistent with other states. No decision, however, establishes consistency as a constitutionally permissible basis for impairing City's insuring agreements with State Fund.

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[8]In contrast to the states cited by State Fund, other states conclude apportionment as between the insurers of a single employer or between employers is appropriate and required where acts of different employers or during different periods contribute to an injury: *Derwinski v. Eureka Tire Co.*, 407 Mich. 469, 286 N.W.2d 672 (1979); *Doherty v. Grow Construction Company*, 14 A.D.2d 957, 221 N.Y.S.2d 9 (1961); R.I. Gen. Laws § 28-34-9; *Yokum v. Lester*, 544 S.W.2d 234 (1976, Ky.); *Dunbar Fuel Co. v. Cassidy*, 100 N.H. 397, 128 A.2d 904 (1957); *Employers' Cas. Co. v. United States Fidelity & Guar. Co.*, 214 Ark. 40, 214 S.W.2d 774 (1948); *Quinn v. Automatic Sprinkler Co.*, 50 N.J. Super. 468, 142 A.2d 655 (1958); *Merton Lbr. Co. v. Industrial Commission*, 260 Wis. 109, 50 N.W.2d 42 (1952); *Andrus v. Boise Fruit & Produce Company*, 84 Ida. 245, 371 P.2d 256, 262 (1962); *Continental Casualty Co. v. Industrial Commission*, 8 Ariz. App. 289, 445 P.2d 846, 847 (1968); *Tri-State Insurance Co. v. Industrial Commission*, 151 Colo. 494, 379 P.2d 388, 389 (1963); *Mund v. Farmers' Cooperative*, 139 Conn. 338, 94 A.2d 19 (1952); *Castille v. Trinity Universal Insurance Company*, 177 So.2d 647 (La. App. 1965); *J.E. Greene Co. v. Bennett*, 207 Tenn. 635, 341 S.W.2d 751 (1960).

Moreover, although certain states impose liability on the last employer, those states have no rule regarding apportionment between insurers of that employer: Montana, Texas, New Mexico, Missouri, Alabama, Iowa, South Dakota. Other states have not reached any clear decision as to which employer or which insurer is responsible: Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, Hawaii, Nebraska and Mississippi.

Moreover, a less biased view of the legislative history indicates that the amendment was caused by a desire to "punish" those public entities who refused to continue their insurance arrangements with State Fund.

Ignoring the question of State Fund's excessive rates and substandard performance, the Legislature was keenly aware of the refusal of public entities to renew coverage. (Assem. Com. on Finance, Insurance and Commerce, Interim Hrg. on Assem. Bill 155 (Jan. 12, 1977), pp. 369, 374, 204-205). Moreover, despite State Fund's representations about its " 'long and impressive record of substantial dividend payments' " (Br. at 4), the Legislature knew State Fund had failed to make such payments. (*Id.* at 211). The Legislature, however, did not repeal the statutory provisions granting State Fund a protected monopoly nor censure State Fund for bad claims practices. Instead, it transferred liability from State Fund to these former insureds which it estimated to be approximately $52.7 million. (*Id.* April 27, 1977 at p. 4). With the accumulation of interest and earnings, the total reserve now amounts to $70 million. (State Fund Annual Report 1981, p. 14, n. 4). How that sum may be dissipated by State Fund is constitutionally irrelevant.

State Fund's unsupported argument that the prior legislation created a "procedural morass" requiring legislative correction cannot withstand analysis. As indicated in the Jurisdictional Statement (at 20, App. 57), apportionment requires a maximum of only two litigants — the public entity and State Fund because of its monopoly in providing such insurance coverage to public entities. That obvious fact was found by the Workers' Compensation judge. *Id.* Accordingly, it is obvious why no appellate tribunal has questioned the self-evident truth there was no procedural morass justifying the direct impairment of City's contract with State Fund.

Finally, State Fund asserts the amount of the dollars involved is insignificant since the percentage of cumulative trauma claims amount only to 12½% of all claims filed. (Br. at 24). Moreover, it asserts that as employees leave City's employ, City's financial responsibility will decrease. (*Id.*) Those considerations are irrelevant to resolution of the Atkinson and other claims.

Assuming the risk is so low and the cost so minimal, State Fund should carry no substantial burden in honoring its contractual responsibilities.

4. Conclusion.

For the reasons stated above, City of Torrance respectfully submits that the appeal should be heard on the merits and decision of the California Supreme Court be reversed.

Respectfully submitted,

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82-1436

No. A-559

In the Supreme Court

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OCTOBER TERM, 1982

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VS.

WORKERS' COMPENSATION APPEALS BOARD
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STATE COMPENSATION INSURANCE FUND,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF

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No. A-559

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CITY OF TORRANCE,
Appellant,

VS.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA AND
STATE COMPENSATION INSURANCE FUND,
Appellees.

On Appeal From the Supreme Court of the State of California

MOTION OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The California Workers' Compensation Institute[1], a non-profit research organization representing carriers that provide coverage accounting for more than 97% of all workers' compensation premium in the State of California, moves pursuant to Supreme Court Rule 36.3 for leave to file a brief as *amicus curiae* urging appellees' motions to dismiss or affirm be granted. The consent of attorneys for appellees has been obtained. The present motion is made necessary because we have been unable to obtain the consent of the appellant City to file the appended brief.

[1]Hereinafter "Institute". Citations herein are to the Jurisdictional Statement ("J.S.") and the Appendix filed therewith ("J.S.App.").

The case now before the Court raises no substantial federal questions; representing merely one of myriad examples of appropriate legislative adjustment of the employer-employee relationship status within the workers' compensation benefit system to be found on both the state and federal levels. As will be demonstrated in Institute's accompanying brief, appellant's principal contentions are totally unfounded. Neither the asserted legislative effect upon the subject policy of workers' compensation insurance, abrogation of State Funds obligation to pay insurance benefits for victims of cumulative trauma (J.S. 2), nor the stated purpose of the subject statute, "The abrogation of State Funds financial obligations to City and similar employers to pay cumulative trauma claims" (J.S. 19) are factually supportable or legally sound.

The subject legislation represents a well-recognized reserved power of the State to regulate the business affairs of its citizens, including its sub-divisions such as the appellant City, respecting the rights and obligations of employers to provide workers' compensation benefits to the industrially injured and their dependents, and to provide for an assurance program to safeguard prompt and adequate provision of these benefits. The challenged legislative action was part of a continuing process of employer benefit liability period contraction begun in 1973 and intended to bring the California Workers' Compensation Act in line with the prevailing national rule. Both appellant City and Institute participated in the extensive legislative hearings conducted prior to the enactment of this statute; as did a substantial number of other members of the entire California community of insured and self-insured

employers, labor unions, insurance industry representatives and officials of government agencies such as the Workers' Compensation Appeals Board, the office of the Insurance Commissioner and the California Rating Inspection Bureau.

Institute believes it would be helpful to explain why the challenged state legislation is an appropriate exercise of California's reserved right to regulate the employer-employee status of its citizens, including its subdivisions, for the purpose of providing a complete system of workers' compensation and adequate insurance coverage of such liability as mandated by its own state constitution and why the presently sought jurisdictional review is not required. For these reasons, we request that the Court grant the motion of Institute for leave to file a brief as *amicus curiae*.

Dated: April 11, 1983.

Respectfully submitted,

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No. A-559

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On Appeal From the Supreme Court of the State of California

BRIEF OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE AS AMICUS CURIAE

California Workers' Compensation Institute as *amicus curiae* urges that this Court, pursuant to Rule 16.1(b), grant appellees' motions to dismiss on the ground that the appeal fails to present a substantial federal question or grant their alternative motions to affirm the judgment of the Supreme Court of the State of California on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

INTEREST OF THE AMICUS CURIAE

California Workers' Compensation Institute[1] is a non-profit research organization representing carriers that provide coverage accounting for more than 97% of all workers' compensation premium in the State of California, and concerns itself with matters of importance in the law and administration of workers' compensation in the State, including the assurance of such benefit payment liability through State regulated insurance and self-insurance programs.

The Institute's purposes include the examination of public issues that affect the California Workers' Compensation Act and to assist in the development and presentation of sound economic principles and responsible public policy in that area of the law. The Institute participated in the presentation of such policy statements in testimony before the California Legislature Assembly Committee on Finance, Insurance and Commerce during the pendency of the currently challenged statute, and to which proceeding record appellant refers as authority for many of its factual assertions (J.S. 6, 11, 12 and 14). The Institute also participated in the litigation of this case through the filing of a brief *amicus curiae* on behalf of the position of appellees in both the District Court of Appeal and the Supreme Court of the State of California proceedings below.

As explained in the accompanying Motion the Institute believes that the subject legislation, narrowing the period of compensable injurious employment in cumulative occupational injuries and eliminating a prior "single employer exception" classification, did not impair the full coverage

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[1]Hereinafter "Institute". Citations here are to the jurisdictional statement (J.S.) and the Appendix filed therein, ("J.S. App.").

obligations of the standard California compensation insurance policy involved. Nor did this social legislation, regulating the State's system of Workers' Compensation through adjustment of the employment status obligation under its reserved power, have as either a stated purpose or actual result, ". . . That the State, as a party to the contracts, had improperly repudiated its financial obligation to City for no purpose other than to increase its own coffers" (J.S. 25).

There is widespread concern that appellant's perhaps superficially appealing argument, previously rejected by both State and Federal Courts in like circumstances, not be mistakenly entertained by this Court. Acceptance of this false and misleading constitutional contention would allow private contracting parties to establish their own measure of financial responsibility, created by their employment status, to the exclusion of the State's well recognized and longstanding public interest in the welfare of its citizens through an appropriate and adequate workers' compensation system. The Institute, as an organization representing a substantial segment of the California insurance industry, has a particular interest in submitting its view of this issue to the Court.

STATEMENT

Three central factual elements of this case merit isolation and presentation in this ancillary brief, lest their previous court opinion discussion and comprehensive appellee presentations be somewhat obscured by thorough consideration of other pertinent matters.[2]

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[2]It is noteworthy that appellant's principal asserted facts are garnered not from the evidentiary record of this case but from the legislative record which establishes the obviously valid political nature of this constitutionally challenged state enactment.

1. The clearly stated legislative purpose of the 1977 enacted changes of California Labor Code § 5500.5 was not solely "administrative convenience" as appellant asserts (J.S. 19).[3] Included as well was the purpose of taking into account for insurance premium purposes those compensable cumulative occupational injuries that were accruing but not reported.[4] This previous underwriting deficiency was experienced by all involved in the compensation benefit assur-

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[3]The multiple legislative goals of this statutory adjustment of the Compensation Act are generally set forth in the opinion of the Court of Appeal (J.S. App. 30-31). In a previously decided case of the California Supreme Court, *Flesher v. Work. Comp. Appeals Bd.*, 23 Cal.3d 322, 152 Cal.Rptr. 459 (1979), the 1973 and 1977 statutory amendment objectives were described as follows:

> "The purpose of these amendments was to provide greater certainty to insurers in anticipating costs and necessary reserves, to simplify the proceedings by reducing the number of employers and insurers required to be joined as defendants, and to reduce the burden placed on the entire system by the former procedure." (23 Cal.3d 322, 328, 152 Cal.Rptr. 459, 463.)

[4]Workers' Compensation Rating Bureau Chairman, Leo Sousa, chief of the licensed rating organization charged with the responsibility of compiling statistical data for Workers' Compensation Insurance premium ratemaking under California Insurance Code § 11750-11758, testified at these legislative proceedings:

> "I would like to make some statements for the committee's information that prior to January 1, 1977 there was no specific provision in the rates to cover cumulative injury cases. The current ratemaking procedure only takes into account those cumulative injury cases that are reported with regular experiences. This is to be borne in mind that all policy holders (I am including those that were insured then that are legally uninsured now or self-insured) of prior years did not pay the premium for the cases that were incurred then that are being reported now. The premium of current policy holders is being used to pay for these old cases. Moreover, from the premiums that are being collected now through bulk reserving or the IBNR, we are attempting to anticipate the costs of future cumulative injury claims."

ance system and include all workers' compensation insurance carriers and self-insured employers, not just the State Compensation Insurance Fund.

2. The subject policy of California workers' compensation liability insurance was issued in conformity with stringent State requirements governed in important particulars by statute and as to substance and form by the State's Insurance Commissioner.[5] The covenants of this insurance contract, to which appellant refers in support of its impairment allegations, are contained in all California compensa-

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(California Assembly Committee on finance insurance and commerce interim hearings January 12 and 19, 1977, page 247.)

Mr. Souza further stated:

"Our recommendation, simply stated—we need a system where we can more accurately forecast claim costs including cumulative injury cases for one or two years in advance in contrast to the present system where we anticipate costs for each year of the next twenty or more years. Correspondingly, the carriers then can more realistically estimate their reserve needs if we are on this claims-made basis that we are recommending for adoption. And incidentally, this also applies to self-insurers or governmental agencies that are legally uninsured. They could probably do a better job of estimating their Workers' Compensation costs under the proposed system than under the present system."

(*Id.*, at page 248.)

Appellant became self-insured July 1, 1971 and therefore its contentions both of being deprived of coverage for incurred but not reported cumulative injury claims during State Fund coverage for which it "had paid more than $1.5 million in premiums" (J.S. 2) and that the Fund established reserves for such unreported losses from premiums paid by the City are not simply unjustified speculation without evidentiary support, they are false.

[5]California Ins. Code §§ 11650-11662 and *see generally* 2 Hanna, *California Law of Employee Injuries and Workers' Compensation* "Insurance Policy and Coverage Generally", § 21.01, pp. 21-2.1 to 21-4.

tion policies by statutory decree.[6] The issuing insurance carrier, appellee State Compensation Insurance Fund, is a public enterprise fund, self-supporting and self-operating, fairly competitive with other insurers, and a legal entity distinct from the State as such.[7]

Based upon the aforementioned requisite uniformity of essential convenants of California workers' compensation policies and upon the fact that appellee State Compensation Insurance Fund enjoys no greater status than any other California insurer it is evident that the 1977 statutory amendment applies to all insurers and self-insurers and is not special legislation of the State intended to repudiate its financial obligations to City for no purpose other than to increase its own coffers, as falsely claimed. (J.S. 25)[8]

3. The 1977 amendment of Labor Code § 5500.5 redefined the period of compensable injurious exposure in cumulative occupational injury cases, completing the established legislative program of shortening this period, begun in 1973, by prescribing a gradual reduction to a one year term of employment liability, and eliminating the "single employer exception" classification privilege. This redefinition of employers statutory obligation to provide compensation benefits was based upon status, not contract,[9] and

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[6]California Ins. Code §§ 11650-11662.

[7]California Ins. Code §§ 11773 and 11775; and *see generally* 1 Hanna Op. Cit. supra, § 2.04[1].

[8]The importance of security arrangements and the value of state funds as one of three basic methods of insuring employer workers' compensation is appropriately noted in the report of the *National Committee on State Workers' Compensation Law*, July 1972, pp. 112 and 113.

[9]*Noe v. Traveler's Insurance Co.* 172 Cal.App.2d 731, 342 P.2d 978 (1959).

the policy covenants of the State Fund contract, obligating it pay in accordance with liability assessed against employment during its policy coverage, remained unimpaired.

ARGUMENT

I

THE CHALLENGED STATE LEGISLATION IMPAIRS NO VESTED CONTRACTUAL OBLIGATION

The history of litigation arising from Labor Code § 5500.5 enactment and amendment since its inception in 1951 is instructive both in establishing the long-standing legislative activity in this area and in demonstrating that appellant's claim of "vested right" impairment (J.S. 14, 15 and 16) is absurd. In the case of *State of Cal. v. Ind. Acc. Comm. and Koski*, 175 Cal.App.2d 674, 246 P.2d 861 (1959), noted by the District Court below (J.S. at 34-35), a similar "vested right" argument was made by a California compensation carrier claiming a right of contribution from a state supported second injury fund, the Subsequent Injuries Fund.[10] The compensation claim in this case was

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[10]The court in that case cited with approval the following passage of 45 Cal.Jur.2d, "statutes" § 88, pp. 604-606 (now 58 Cal.Jr.3d, "statutes" § 72, pp. 418-420):

> "The repeal of a law does not validate a contract or other transaction which, before the repeal, was invalid. Conversely, the repeal of the statute does not ordinarily divest a right that is vested and complete at the time of the repeal. But where the right is not vested but inchoate, and the right or remedy given by the statute is not of common law origin, the right falls and the statutory remedies ceases, even after commencement of an action or repeal, without a saving clause, of the statute, unless the right was converted into final judgment before the repeal, or unless there is subsequent law that enables the court to try and determine the right.

neither asserted nor finally adjudicated until after the 1977 amendment of Labor Code § 5500.5 which removed the "single employer exception" upon which appellant relies to assert a right of contribution. The City had therefore no "vested right" against its former insurance carrier with respect to its duty as an employer to pay a death benefit to the dependent of its employee.

II

THE APPEAL PRESENTS ISSUES THAT ARE TOTALLY POLITICAL IN NATURE AND PROPERLY RESERVED TO THE STATE LEGISLATURE

A. The rights and liabilities pertaining to benefits under the California Workers' Compensation Act are not founded upon contract but are statutory rights arising from the employer-employee relationship and are imposed by the law as incidents of that status. *Argonaut Mining Co. Ltd. v. Ind. Acc. Comm. and Gonzalez*, 104 Cal.App. 27 (1951). It is a valid exercise of state police power and may not be encumbered by private contract. *Alaska Packers Assn. v. Ind. Acc. Comm.*, 294 U.S. 532, 79 L.Ed. 1044 (1934).

B. The regulation of contracts of insurance is also a valid exercise at the same reserved power of the State. *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1913). Both the measure and distribution of employer liability

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The repeal of a statute conferring civil rights or powers operates to deprive the citizens of all such rights and powers that are at the time inchoate, incomplete and unexercised. Thus, the repeal of a statute takes away the remedies afforded by it and defeats actions or proceedings pending under it at the time of the repeal, particularly where the cause of action was created and the remedy given by the statute and was not known to the common law."

for compensation benefits and maintenance of a sound assurance program to secure these payments are well recognized legislative objectives of the State under its police power.[11]

C. The subject legislation is entitled to every possible presumption of validity until proven to the contrary beyond a reasonable doubt. *Powell v. Pennsylvania* 127 U.S. 678 (1887). This statute involving a widely diffused public interest may not be encumbered by an isolated claim of private contract impediment. *East New York Savings Bank v. Hahn* 326 U.S. 330, 90 L.Ed. 34 (1945).

D. The legitimate State purposes of this challenged legislation have been identified, and are sanctioned by past opinions of this Court previously cited. Not only has appellant failed to prove the absence of either necessity or reasonableness of the statute, it has also failed to establish that a State contract is involved.[12] This State economic

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[11]This Court noted the nature and public concern of insurance contracts in the *German Alliance Ins. Co.* case, *supra*, as follows:

> "The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the monies of the insured, possessing great power thereby, and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand, to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is therefore essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times,—certainly the sense of the modern world,—is it of the greatest public concern."
>
> (233 U.S. 389, 414-415.)

[12]*See U.S. Trust Co. v. New Jersey* 431 U.S. 1, 52 L.Ed.2d 92 (1977).

and social legislation is, therefore, entitled to this Court's deference as to its stated need and reasonableness. *East New York Savings Bank, supra.*

III

NEITHER STATE NOR FEDERAL DECISIONAL LAW SUPPORT APPELLANT'S ARGUMENT

A. It is noteworthy that appellant offers in support of its position no decisional law, either State or Federal, involving a contract of Workers' Compensation Insurance nor even treating the general subject of the Workers' Compensation system. It is respectfully submitted that none exist.

B. The challenged statute is in keeping with both the prevailing national rule of the states and with Federal legislation on the subject.[13] The following two State and Federal Court decisions are offered in support of appellees' motions both because they are representative of multi-jurisdiction judicial rejection of appellants' argument and because they specifically treat the asserted issue of "vested rights" under a compensation insurance policy and alleged contract impairment.

In *Douglas County v. Ind. Comm.*, 275 Wisc. 309, 81 N.W.2d 807 (1957), the Wisconsin court held that the

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[13]A rather complete compilation of state decisional law limiting employer liability to a relatively brief period of last injurious exposure is found in 4 Larson, *Law of Workers' Compensation*, § 95.21, pp. 17-79 to 17-88 and will not be here further enumerated.

The federal approach to this socio-economic problem is well established in the Longshoremens' and Harborworkers' Compensation Act case of *Traveler's Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955).

county employers statutory right to offset retirement benefits against its obligation to provide Workers' Compensation death benefits did not become vested even though legislative recission occurred after the employee's demise, but before an award was made. It further held that the financial responsibility of the employer's carrier, under a full coverage policy similar to that of the State Fund, was to be measured by the employer's liability under the law at the time its obligation was legally determined, not at the time its contract was consummated. A legislative revocation was found to neither interfere with vested rights nor impair the obligation of a contract.

In the Federal employee benefits system under the Longshoremen's and Harborworker's Compensation Act the case of *Todd Shipyards Corp. v. Witthuhn,* 596 F.2d 899 (9th Cir. 1979), offered because of both its facts and a learned concurring opinion of Justice Sneed, further supports appellees' position. In upholding legislation providing a death benefit enacted after the industrial injury but before the worker's demise, the court specifically rejected the argument of the employer and its carrier that the statute retroactively impaired their vested rights under the insurance policy. Justice Sneed accurately observed in his concurring opinion that regardless of the absence of existence of Federal constitutional restraint upon Congress to abrogate the contractual obligation of others, the relationship of employer and employee partakes the characteristics of status rather than contract. It was unanimously agreed that the expectations of the parties that the government would not alter the employer's compensation obligation did not give rise to vested rights which could not be modified retroactively. Such is the case at bar.

CONCLUSION

For the reasons stated herein, this appeal should be either denied, dismissed, or, in the alternative the judgment entered in the cause by the Supreme Court of the State of California affirmed.

Dated: April 11, 1983.

Respectfully submitted,

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82-1436

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BRIEF OF AMICUS CURIAE, COUNTY OF LOS ANGELES, IN SUPPORT OF THE APPELLANT.

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BRIEF OF AMICUS CURIAE, COUNTY OF LOS ANGELES, IN SUPPORT OF THE APPELLANT.

The County of Los Angeles is a political subdivision of the State of California and files this brief as *Amicus Curiae* in support of the Appellant, City of Torrance, pursuant to Rule 36.4, Rules of the Supreme Court of the United States.

Interest of *Amicus Curiae*.

The City of Torrance seeks to have reversed the decision of the Supreme Court of the State of California in *City of Torrance v. Workers' Compensation Appeals Board and State Compensation Insurance Fund*, 32 Cal.3d 371, 185 Cal.Rptr. 645 (1982). In that decision the state court held that the Contracts Clause was not violated by state legislation which relieved the City's former insurance carrier, Appellee State Compensation Insurance Fund, of its contractual re-

sponsibility to indemnify the City for its losses due to long term cumulative injuries to City employees. As admitted by the Appellee, but for the subject legislation, the State Fund would have indemnified the City for the City's losses based on the proportion the injurious exposure in the insured period bears to the total exposure which produced the injury.

The City of Torrance purchased policies of workers' compensation insurance from the State Fund until the City became legally uninsured on July 1, 1971. The County of Los Angeles had a similar relationship with the State Fund.

The County of Los Angeles is the largest political subdivision of the State of California and employs approximately 70,000 persons. Approximately 40 percent of the claims for workers' compensation benefits filed by County employees involve long term, cumulative injuries. In order to fulfill its legal obligation to provide workers' compensation benefits to its employees, the County of Los Angeles purchased policies of insurance from the State Fund from 1938 until the County became legally uninsured on July 1, 1969. In exchange for the State Fund's promise to indemnify, the County of Los Angeles paid substantial premiums. For example, from July 1, 1959 to June 30, 1969 the yearly net premiums paid to the State Fund by the County, after dividends and refunds, ran from $1,409,731.00 for the 1959-1960 contract to $8,672,305.00 in the 1968-1969 contract year. In the ten year period from July 1, 1959 through June 30, 1969, the State Fund charged the County $48,-843,682.00, net, for undertaking the County's workers' compensation liability risk.

The legislation which the City argues impairs the contractual obligations owed to it by the State Fund also impairs those obligations which were assumed by the State Fund

and were paid for by the County of Los Angeles over the course of thirty years. These are obligations which the Appellee State Fund admits it would meet but for the legislation at issue.

ARGUMENT.

I.

Contrary to the Finding of the California Supreme Court, the Language of the Insurance Contract Does Not Indicate That It Was the Intention of the Parties to Incorporate All Subsequent Changes in the Law.

The first step in the analysis of whether a state law violates the Contracts Clause is to determine whether it operates as a substantial impairment of a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 57 L.Ed.2d 727, 736, 98 S.Ct. 2716, 2722 (1978). The issue is one of federal law and this Honorable Court is not bound by any determination made by the California Supreme Court. Its independent determination will extend to the questions of whether a contract exists, the nature of the obligations created, as well as the meaning of the state law in question, whether it impairs the contractual obligations and violates the Contracts Clause. *Coombes v. Getz*, 285 U.S. 434, 441, 76 L.Ed. 866, 871, 52 S.Ct. 435, 436 (1932).

The California Supreme Court's analysis did not go beyond the threshold question of whether an impairment of the contractual relationship existed. It is at that point that the state court came to the unsupported conclusion that the terms of the contract of insurance evidenced an agreement by the City that changes in the law subsequent to the contract would be incorporated into the agreement, including the law at issue which relieves the insurance carrier, State Fund, of its obligation to indemnify the City for its share of liability for cumulative injuries. *City of Torrance v. Workers' Compensation Appeals Board and State Compensation Insurance Fund*, 32 Cal.3d 371, 379-380, 185 Cal.Rptr. 645, 649.

The question is, could the contract be reasonably read as contemplating that the legislature might subsequently pass a statute which would absolve the State Fund of the obligation to indemnify which the City purchased? See *Continental Illinois National Bank and Trust Company of Chicago v. State of Washington*, 696 F.2d 692, 698 (C.A. 9, 1983).

The County submits that the language of the contract is not susceptible of the construction given by the California Supreme Court.

The language at issue is as follows:

> "State Compensation Insurance Fund . . . does hereby agree . . . (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries, and for the reasonable cost of medical, surgical supplies, crutches, apparatus and artificial members; to be directly and primarily liable to employees covered by this Policy, or in the event of their death, their dependents, to pay the compensation, if any, for which the Insured is liable . . .; and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the Insured under the provisions of the Workmen's Compensation Laws of the State of California . . ." (Appellant's Brief, Appendix, page 33.)

From this language the state court concluded:

> "Clearly the only obligation the State Fund assumed was the obligation to pay what the workers' compensation law required." (32 Cal.3d, *supra*, at 378, 185 Cal.Rptr. at 648.)

This statement contains the first error in the state court's fallacious construction of the contract. The court's statement did not go far enough to correctly state the obligation as-

sumed by the State Fund. More accurately stated, the obligation the State Fund assumed was the obligation to pay what the workers' compensation law required the *Insured, City of Torrance to pay.*

Having once erred, and essentially rewritten the promise made by the State Fund, the state court then raised the question as to whether the contract encompassed subsequent changes in the law. Without pointing out the language upon which it relied, the court concluded:

> ". . . the language of the agreements between the City and the State Fund clearly indicates that it was the intention of the parties to incorporate subsequent changes in the law."

The County of Los Angeles submits that a reading of the language of the agreements fails to reveal an expression of intent that subsequent changes in the law could alter the State Fund's obligation to indemnify the City of Torrance. There is no reasonable basis from which to draw such an inference.

It is well settled that in the construction or interpretation of language in a contract, the courts are guided by the general principle that effect is to be given to the intention of the parties as expressed in the language used. The courts may not in the name of "construction" rewrite an unambiguous agreement and thus make a new contract for the parties. *Imperial Fire Insurance Company of London, England v. County of Coos*, 151 U.S. 452, 462, 38 L.Ed. 231, 235, 14 S.Ct. 379, 381 (1894). The courts may not disregard the words used in a contract nor insert words into the agreement of which the parties have not made use. *Harrison v. Fortlage, et al.*, 161 U.S. 57, 63, 40 L.Ed. 616, 618, 16 S.Ct. 488, 489 (1896).

The California Supreme Court's construction of the contract provisions necessitates a repositioning of the parties

in their relationships. What was once the State Fund's promise to pay those benefits the City of Torrance was found obligated to pay to its employees, now, after construction of the contract, becomes the State Fund's promise to pay only that which the state legislature deems State Fund will pay, irrespective of what obligation remains with the City to its employees.

The absurdity of the construction given by the California Supreme Court is dramatized by amending the contract terms to conform to the state court's interpretation as follows:

> "State Compensation Insurance Fund . . . does hereby agree (1) To pay promptly and directly to any person entitled thereto under the Workmen's Compensation Laws . . . and as therein provided, any sum due for compensation . . .; to be directly and primarily liable . . . to pay compensation, if any, for which the ~~Insured (City)~~ *State Compensation Insurance Fund* is liable . . .; and (to) be bound by and subject to the orders, findings, decisions or awards rendered against the ~~Insured (City)~~ *State Compensation Insurance Fund* under the Workmen's Compensation Laws . . ."

The contract terms, without question, show the State Fund unequivocally promising to assume the City's obligations for workers' compensation benefits relative to the contract period. There are no terms in the contract which would evidence an anticipation that the State Fund might be relieved of its promise to indemnify. The only language cited in the state court's opinion which might support such an inference is not taken from the contract, but is found in the state court's own inadequate and erroneous paraphrasing of the State Fund's promise.

II.

Aside From the Terms of the Contract, the Fact That the Parties Could Anticipate Certain Kinds of Changes in the Law as Affecting the State Fund's Contractual Obligation Does Not Mean That the City Had No Other Legitimate Contractual Expectation but That Any Kind of Change in the Law, Including the Abrogation of the State Fund's Obligation, Would Be Incorporated Into the Agreement.

As pointed out by California Supreme Court Justice Mosk in his dissent in *City of Torrance v. Workers' Compensation Appeals Board and State Compensation Insurance Fund, supra*, 32 Cal.3d, at 383-384, 185 Cal.Rptr., at 651-652, changes in the law affecting the obligations of the City of Torrance to its employees could be anticipated because, under workers' compensation law, the relationship of employer and employee is not contractual, but is a legal status the incidents of which are subject to statutory definition. *Argonaut Mining Co. v. Industrial Accident Commission (Gonzales)*, 104 Cal.App.2d 27, 230 P.2d 637 (1951). On the other hand, the relationship of insurance carrier and insured employer is based on contract. See *Imperial Fire Insurance Company of London, England v. County of Coos*, 151 U.S. 452, 462, 38 L.Ed. 231, 235, 14 S.Ct. 379, 381 (1894).

Under the rule of the *Argonaut* case, the insurer who assumes the insured employer's obligation to its employees assumes the risk that compensation rates may be increased above the rates in effect at the time of the contract. That is so because the scope of the employer's obligation to its employees, which is not limited by contract (California Labor Code Section 5000), can be changed. This is part of the obligation of the employer which is assumed by the

insurance carrier. The anticipation of such a change is part of the data upon which the employer decides to insure or choose self-insurance and it is one of the risks upon which the insurer sets the premium and agrees to insure.

That contracting parties could anticipate *some* kind of alteration of their contractual obligations by subsequent legislation does not mean that the parties should be held to have contemplated the incorporation of *all* kinds of subsequent legislation into the contract. *Continental Illinois National Bank and Trust Company of Chicago, et al. v. State of Washington*, 696 F.2d 692, 697-698 (C.A.9, 1983).

It is reasonable to conclude that the parties must have anticipated that the rate of compensation payable to employees would change with legislative adjustments for increases in the cost of living. Insurance companies have been on notice of this fact since at least 1951 when the *Argonaut* decision was issued.

However, there was no case precedent, nor any statutory provision, that would have apprised the City of Torrance and other similarly situated employers that the promises of indemnity for which they were paying could be abrogated by subsequent legislative fiat. This was not the same kind of change which could be anticipated, by virtue of the decision in *Argonaut*, as affecting the State Fund's obligations under its contracts of insurance. Cf. *Continental Illinois National Bank and Trust Company v. State of Washington*, 696 F.2d, *supra*, at 698.

In light of the absence of any case precedent, statutory provision or express agreement to be bound by any future decision of the state legislature which might wrest from the City the benefit of its bargain, it is unreasonable to impose on the City, subsequent to its payment of premium, continued success in the legislature as a condition precedent to collection on the State Fund's promise to indemnify.

Conclusion.

When the City purchased the policies of insurance from the State Compensation Insurance Fund, it paid the State Fund to undertake the risks associated with workers' compensation liability which occurred during the period of coverage. The avoidance of risk was the very purpose the City had in entering the insurance contracts. It was unreasonable for the Supreme Court of the State of California to hold that, even though the City was paying the State Fund to assume the risk of loss, the City was, depending on the whim of the legislature, looking forward to assuming the very risk it sought thereby to avoid.

The implications of the decision of the state court are ominous. How can a contract of insurance be of value when any promisor powerful enough in the legislature may subsequently have its contractual obligations relieved by legislative fiat?

The City's contractual rights have been annihilated by the state law in question. The County of Los Angeles submits that the law in issue obviously impairs obligations under contracts. The constitutional dimensions of this impairment are fully addressed in the Appellant's Jurisdictional Statement.

It is prayed that the Appellant be granted the relief it seeks.

Respectfully submitted,

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82-1436

No. A-559
IN THE

Supreme Court of the United States

October Term, 1982

CITY OF TORRANCE,

Appellant,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE COMPENSATION INSURANCE FUND,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF OF AMICUS CURIAE, INDUSTRIAL INDEMNITY COMPANY, ON BEHALF OF APPELLEE STATE COMPENSATION INSURANCE FUND.

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Question Presented.

HAS THE CALIFORNIA LEGISLATURE CONSTITUTIONALLY LIMITED THE EXPOSURE PERIODS OF OCCUPATIONAL DISEASE CLAIMS?

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CITY OF TORRANCE,

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vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STATE COMPENSATION INSURANCE FUND,

Appellees.

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF OF AMICUS CURIAE, INDUSTRIAL INDEMNITY COMPANY, ON BEHALF OF APPELLEE STATE COMPENSATION INSURANCE FUND.

Industrial Indemnity Company, a California Corporation licensed to engage in the insurance business, having secured the consent of the real parties in interest, moves for leave to file Brief Amicus Curiae, on behalf of the State Compensation Insurance Fund in support of its motion to dismiss the appeal of the City of Torrance and to affirm the decision of the Supreme Court of the State of California.

Interest of Amicus Curiae.

Industrial Indemnity Company, as a major underwriter of workers' compensation insurance, extending such protection to the employees of many major commercial insureds

within the State of California, has been a responsive and responsible force in the development and evolution of the workers' compensation laws of that State. Along with many others, Industrial Indemnity Company supported legislation which in 1977 amended the workers' compensation laws of California. The City of Torrance seeks to invalidate a part of that legislation on the grounds that it unconstitutionally impairs its contracts of workers' compensation insurance extending from the State Compensation Insurance Fund. The Supreme Court of California has rejected that contention and upheld the legislation in question. Industrial Indemnity Company is concerned that unless the decision of the court and the constitutionality of the legislation is upheld, that the continuation of the workers' compensation program and its ability to provide prompt and full compensation benefits to the workers of California will be in jeopardy.

ARGUMENT.

I.

Constitutional Mandate.

The authority to create and enforce a complete system of workers' compensation is contained in Article XIV, Section 4 of the State Constitution.[1] It imposes upon the legislature the responsibility of enacting statutes which implement the declared social and public policy of the State concerning the health, safety and well-being of the work force.

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[1]California Constitution, Art. XIV, §4.

> The legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a state compensation insurance fund; full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government. . . .

In compliance with the constitutional mandate and consistent with changing theories of compensability, changing economic circumstance and even changing moral concepts, the legislature has amended, added and deleted Sections of the Workers' Compensation Insurance Safety Act since its passage in 1917. This evolution of the workers' compensation law represents a proper exercise of the State's police power. Legislation has extended to the establishment of rules regarding compensability, definitions of injury, dates of injury, dependency and contribution among parties. Historically, constitutional challenges to this vital system of workers' compensation have been answered by reference to this constitutional mandate and the State's police power. Consequently, the growth of this body of legislation, so basically founded, now represents a social system affecting the entire working community of California.

The concept of occupational disease as a compensable entity was recognized by the California legislature in 1951 by the enactment of Labor Code Section 5500.5. It was the purpose and intent of the legislature to develop procedures which facilitated recovery for disabilities due to progressive diseases. An injured employee was permitted thereby to elect to proceed against one or more successive employers or insurance carriers for the entire consequence of his occupational disease even though that particular employment was not the sole cause of the disability. Those held liable would have the burden of seeking and securing contribution.

Attacks against Labor Code Section 5500.5 on constitutional grounds were rejected by the Court in *Pacific Employers Insurance Company v. Industrial Accident Commission* (1963) 219 Cal.App.2d 634, 643, 33 Cal.Rptr. 422.

> The problem with which the legislature was concerned here was no perfect solution. It is a situation where the entity properly chargeable cannot be reached. Either

> the injured employee must go uncompensated, or someone else must "pick up the tab" — either the public, the industry as a whole, or those solvent members of it who participated in causing the disability. The legislature has selected the last alternative, we believe it acted reasonably . . .

Although Section 5500.5 referred expressly to occupational disease claims, its procedures were adopted to permit recovery for the consequences of continuing effort, stresses or series of micro-traumas. This emerging new theory of injury was subsequently designated as cumulative trauma. As a result of procedurally combining occupational disease and continuing trauma claims within the framework of Labor Code Section 5500.5 the required joinder of all employers and insurance carriers created a logistical quagmire of courtrooms full-to-bursting with litigants. The procedural nightmares, inordinate delays and excessive costs associated with such litigation were obstructing the constitutional mandate for the accomplishment of substantial justice expeditiously, inexpensively, and without encumbrance of any character.

Reacting to this situation, the California legislature in 1973 amended Labor Code Section 5500.5, limiting to five years the exposure periods for occupational disease and cumulative trauma claims except in instances involving injurious exposure with a single employer which extended beyond five years. The result of the legislation was to reduce the number of employers and carriers against whom compensation could be sought while maintaining the same level of benefits. In upholding the application of this amendment to injuries occurring before its effective date, the Court in *Harrison v. Workers' Compensation Appeals Board* (1974) 44 Cal.App.3d 197, 118 Cal.Rptr. 508 observed that California was now brought into line with most modern State and Federal workers' compensation systems by limiting the

exposure period for such claims. (4 Larson, Workers' Compensation Law, Sections 95.12, 95.21, 95.25); *Travelers Insurance Company v. Cardillo* (1955) (2d Circuit) 225 F.2d 113, *cert. denied*, 350 U.S. 913; *General Dynamics Corp. v. Benefits Review Board* (1977) 265 F.2d 208; *Cordero v. Triple A Machine Shop* (1978) (9th Circuit) 580 F.2d 1131 (U.S. Supreme Court denied certiorari on February 21, 1979, 47 Law Week. 3554).

In 1977, Section 5500.5 was once more amended to reduce the five year period of liability to a one year period by 1981 as well as eliminating the single employer exception.[2]

The Supreme Court of the State of California in *Flesher v. WCAB* (1979) 23 Cal.3d 322 discussed the legislative purpose for the 1973 and 1977 amendments and referred to the legislative history. (Report of *Workers' Compensation Sub-Committee Interim Hearings on the subject of reforming California Workers' Compensation laws*, Assembly Committee on Finance, Insurance and Commerce, Fall 1977, pp. 8-9, 55-56.) The court was satisfied that the purposes of the amendments were to provide greater certainty to insurers in anticipating costs and to permit the establishment of necessary reserves, to simplify proceedings by reducing the number of employers and insureds required to be joined as defendants, and to reduce the burden placed upon the entire system by the former procedures.

All segments of the workers' compensation community, including legally uninsured public agenices such as Appellant City, participated or were actively represented in the

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[2]The "single-employer exception" of Labor Code Section 5500.5(d) was not enacted until 1973, long after the effective years of the insurance policies in issue. By its terms this exception was temporary only and scheduled to expire on July 1, 1986.

legislative process which culminated in the amendments of 1973 and 1977. The process involved many months of thorough debate during which time no sound reason was advanced for retaining the single employer exception.

On the contrary, by eliminating the single employer exception and imposing liability upon current employers and carriers, employment safety is promoted by motivating employers to correct continuing hazardous and unsafe conditions. The amendment reflects the State's abiding concern for the health and well-being of its employees. Only current employers have the opportunity to promote safety and to develop safer methods of production. It is only by imposing liability upon the most recent injurious employment exposure that an awareness of unsafe conditions is created and safer work places established. Consequently, the goal of providing a safe place of employment as the announced social and public policy of the State is both promoted and achieved by these amendments.

As the cost of industrial disease and cumulative trauma is transferred into the cost of doing business and its products, both the employer and the purchasing public have the option to direct their energies and purchasing power toward safer and, therefore, less expensive production. This internalization of the cost of injury into product prices is promoted by the very amendments complained of by Appellant City. There is a general benefit to society as a whole by imposing a monetary incentive which itself produces an efficient internalization of the costs of injury. (*Workers' Compensation and Internalization of Social Costs: The Case of California*. Contained in the *Background Notes for Workers' Compensation Sub-Committee Interim Hearing on the subject of reforming California Workers' Compensation laws*, Assembly Committee on Finance, Insurance and Commerce, Fall 1977, p. 41.)

II.
No Contract Impairment.

California Insurance Code Sections 11650 through 11656 establish the essential provisions contained in every California compensation insurance policy. The primary obligation of the insurer is to either pay promptly and directly to the injured employee or to indemnify the insured employer pursuant to an entitlement or liability imposed or established under the workers' compensation laws of the State. Those laws then become a part of the insurance contract and establish the basic obligation of the Insurer. (*Argonaut Mining Company v. I.A.C.* (1951) 104 Cal.App.2d 27, 230 P.2d 637; 55 Cal.Jur.2d, Workers' Compensation, Section 7, p. 20; 81 Am.Jur.2d, Workers' Compensation, Section 13, p. 713.) That obligation, modified only by the ever changing compensation laws of the State, continues and nothing contained in the 1977 amendments to Labor Code Section 5500.5 alters or changes it. This was the conclusion of the California Supreme Court. (*City of Torrance v. W.C.A.B. (Atkinson)*, 32 Cal.3d 371, 185 Cal.Rptr. 645.)

As stated by the Court in *In Re Walton* (1972) 28 Cal.App.3d 108, 104 Cal.Rptr. 472:

> When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the State, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the State to amend the law or enact additional laws for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconstitutional impairment of contractual obligations. *Home Building and Loan Association v. Blaisdell*, 209 U.S. 398, 434-438, 54 S.Ct.

208, 231, 78 L. Ed. 413, 426-429; *Castleman v. Scudder* (1947) 81 Cal.App.2d 737, 740, 185 P.2d 35; *Phelps v. Prussia* (1943) 60 Cal.App.2d 732, 741, 141 P.2d 440; *State, etc. Bur. v. Pomona, etc. Assn.*, 37 Cal.2d (Supp.) 765, 768-770, 98 P.2d 829.

Although Appellant City characterizes the effect of the 1977 legislation as a total abrogation of vested contract rights,[3] the obligations of the prior contracts remain in effect and where the injurious exposure to occupational disease or continuing trauma is confined to the period of coverage, the policies of insurance apply and the obligations continue. Again, the amendment complained of, namely the elimination of the single-employer exception, represented but a portion of the legislative intent to remedy the problems created by increased filing of such claims. By far, the most significant effect of the 1977 amendment was to reduce the liability period for occupational disease and continuing trauma claims to one year. This major change is apparently acceptable to Appellant City.

Appellant City further compounds the illusion of impairment by referring to its supposed economic disadvantage. However, Appellant City's decision to become legally uninsured was based on economic considerations and an awareness that the workers' compensation law could and would change. The City chose to bear the monetary risks created by its legally uninsured status. The imposition of liability herein is not the result of the 1977 amendment but the consequence of self-insurance.

In fact, at oral argument (*City of Torrance v. WCAB, supra* at p. 379), Appellant City agreed that it was the parties' intention to incorporate subsequent changes of law

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[3]At no time were the contracts of insurance entered into the evidentiary record.

in their insurance agreements. Only by such incorporation can the employer's obligation remain fully insured as required by law. Only by such incorporation can the State guarantee that prior policies of insurance will continue to provide complete coverage for future compensation benefits. The concept of a vital responsible system of workers' compensation, able to respond and provide needed protection to the workers of the State, requires that private contracts of insurance incorporate changes in the law. The repeal of the single-employer exception, although reducing the opportunity to seek contribution, in no way increased the liability of Appellant City for injurious exposures during periods covered by the State Fund. Rather, that code section imposed liability upon the last year of injurious exposure, whenever found.

III.
Reasonable Exercise of Police Power.

Appellant City has not demonstrated a contractual impairment but rather is expressing dissatisfaction with the legislative process. The basic issue is not whether a contract is affected by statute but whether the legislation is directed toward a legitimate goal and are the measures taken reasonably and appropriately directed to that end. In every case the question is whether the statute is within or without the legitimate purview and scope of the State's police power. If it is reasonable and does have a substantial relation to a legitimate object to be accomplished, then modification or revocation of contracts is permitted as a legitimate exercise of police power. Certainly the purposes of the amendments in both 1973 and 1977 as stated in *Flesher, supra*, represent reasonable and appropriate efforts towards achieving a constitutionally mandated goal, efforts in which Appellant City, self-insureds and insurers all participated. The fact that in

an isolated instance the proper exercise of police power may result in economic disadvantage is again a risk that the Appellant City assumed when it knowingly chose to be legally uninsured.

It is difficult to conceive of any amendments to the workers' compensation law affecting either procedures or substantive rights which will not have an impact upon the liability of the parties within the system. The sole issue therefore is whether the amendment in reasonable fashion accomplishes a legitimate objective. The Appellant City's argument is not based upon the unreasonableness of the legislation but rather on its supposed economic advantage in maintaining the single-employer exception. However, the elimination of that exception is merely a continuation of the procedural reforms begun in 1973 as they apply to continuing trauma and occupational disease claims.

Despite unprecedented legislative activity throughout the country since the 1972 report by the National Commission on State Workers' Compensation laws (established by the Occupational Safety and Health Act of 1970), Appellant City has failed to cite one case where changes in procedures affecting workers' compensation liability were held to impair the obligation of insurance contracts. Rather, Appellant City has gone far afield in its search for citable support, attempting to analogize and compare the instant situation with laws effecting retirement pension plans, covenants funding port authority bonds, public employee salary provisions and the regulation of utilities. Not only is there lack of subject matter comparison but the very foundation for the legislation in these other cited cases lacks the expressed social and public policy and vested concern which the California Constitution mandates with respect to the workers' compensation system.

Appellant City would suggest that the only constitutional justification for legislative impairments of contract arise from emergency situations and that the solutions therefore must be of a temporary nature. However, to assume that these are the exclusive exceptions to justifiable legislative impairment ignores the obligation imposed on the California legislature to effect beneficial changes upon the workers' compensation system of either a permanent or long lasting nature. Where so mandated, a proper exercise of police power in support of an announced public policy neither depends upon the existence of an emergency nor need such exercise be of a limited or temporary nature.

Summary.

Authority to create and enforce a complete system of workers' compensation is established by the California Constitution. The legislature has continually responded to this mandate since it was established in 1917. As part of the continuing evolution of the workers' compensation system the legislature reformed the liability period for occupational disease claims in 1973 and again in 1977. The effect of these reforms was to reduce the period of liability to one year and to eliminate long term contribution for new disabilities. The compelling justification for these reforms is well documented in legislative history and in the Courts' analysis in *Harrison, Flesher* and *City of Torrance, supra.*

Appellant City chose to become legally uninsured in 1971 and, consequently, must bear liability for current claims. Although Appellant City asserts that the 1977 legislation impaired its earlier contracts of insurance with the State Compensation Insurance Fund, City has been unable to provide relevant case law or persuasive argument in support of its position. The California Supreme Court has deter-

mined that the parties to the insurance contracts herein contemplated and anticipated the incorporation of future changes in the workers' compensation law and that the 1977 amendment did not therefore serve to impair the contractual obligations. Appellant City has not demonstrated a contractual impairment but instead is expressing dissatisfaction with the legislative process in which it was fully represented.

Conclusion.

The Appeal should be dismissed and the decision of the California Supreme Court affirmed.

Respectfully submitted,

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